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AN

INQUIRY

INTO

THE EFFECT OF LIMITATIONS

TO

Heirs of the Body

IN

DEVISES:

WITH REMARKS ON THE DOCTRINE OF EQUITY CONCERNING DOUBTFUL TITLES, AND TITLES ACQUIRED BY THE DESTRUCTION OF CONTINGENT REMAINDERS.

BY WILLIAM HAYES,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

Dignitas in tam tenui scientia quæ potest esse? Res enim sunt parvæ, propè singulis literis, atque interpunctionibus verborum occupatæ. Cic. pro Mur.

LONDON:

PRINTED FOR JOSEPH BUTTERWORTH AND SON,

LAW-BOOKSELLERS, 43, FLEET-STREET;

AND J. COOKE, ORMOND QUAY, DUBLIN.

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TO

THE RIGHT HONOURABLE

ROBERT, LORD GIFFORD,

BARON GIFFORD,

MASTER OF THE ROLLS,

&c. &c. &c.

MY LORD,

However weak the pretensions of the following sheets to fulfil the expectation which your Lordship was pleased to express, that the Inquiry which I proposed to institute would prove useful to the Profession; the design at least of a work which aims to restore the authority of ancient legal principles, shaken by modern adjudications, may hope to find favour with your Lordship, who cannot but take a more than common interest in the permanence of those laws which as a citizen you enjoy, as a Judge you dispense, and as a man of talent you illustrate.

In departing, for the sake of change, from the wisdom of ages, we tear down the trophies from the monuments of our ancestors, we violate the sanctity of their fame, and we resign every title to the respect and gratitude of our posterity. To attack and overthrow the solemn resolutions of the fathers and sages of the law, what is it but to establish a precedent which must shorten the date of all juridical fame, and to bespeak for our own labours, and our own opinions, an early oblivion?

The integrity of their fame, and with it the security of some of our most cherished and most valuable rights, is now committed to your Lordship, whose kindred studies, and congenial talents, afford us the best assurance that you will ever regard its conservation as a sacred and delightful charge.

There is no object, perhaps, to which those qualities that have advanced your Lordship to so eminent a station can be directed with more honour to yourself, or advantage to the public, than that of upholding the Law of Real Property, which cannot be rendered precarious without shaking one of the pillars of our national prosperity.

without destroying one of the strongest incentives to honest industry, the hope of acquiring a permanent interest in some portion of our native soil.

If my humble labours should have the good fortune to awaken attention to the state of the law upon the points of which they treat, they will owe it chiefly to the condescension which has permitted them to appear under the auspices of a Judge, from whom the Profession anticipates with confidence a series of decisions calculated to afford another proof that the greatest talents may be fully developed in expounding and applying the learning treasured up in the books of our law; and that even a veneration for precedent may not only consist with the exercise of a sound judicial discretion, but add weight and dignity to the administration of Equity.

I have the honour to be,

My Lord,

Your Lordship's most obedient servant,

WILLIAM HAYES.

Middle Temple,
July 1, 1824.

PREFACE.

TO a work written since the final hearing of the case of Willcox *v.* Bellaers at the Rolls in December last, upon a subject by no means favourable to a rapid progress, but which seemed to demand the earliest consideration, some indulgence will, perhaps, be extended. When the greatest judicial mind feels itself "overpowered by the multitude of the cases, and the subtlety of the distinctions between them," (*a*) much cannot reasonably be expected from ordinary powers and attainments.

The leading objects of the following Inquiry are:—1. To ascertain and fix the signification of the words "heirs of the body" in devises, as explained according to the ordinary rules of interpre-

(*a*) 9 Bligh 50.

ation abstracted from the Rule in Shelley's case; and, 3. To exhibit that Rule as an inflexible rule of law, paramount to intention, which never intervenes till the ordinary rules of interpretation have done their office, and then only to put a decided negative upon one mode in which the remainder to the heirs, after the freehold in the ancestor, is capable, consistently with other principles, of taking effect. The whole subject, thus considered, might, it is conceived, be reduced to a few plain propositions.

The labours of writers high in estimation had, indeed, at no very distant period, laid open the whole learning connected with the principal subject of the following sheets, and rendered its most intricate labyrinths accessible, with ease and pleasure, to the student. But the highways of science, which genius has struck out, require to be maintained and kept open by the diligence of humbler instruments. This Inquiry will serve to shew, at least, in how short a time obstructions may accumulate to such an extent as to render their removal an undertaking of considerable difficulty and delicacy.

It seemed essential to the end proposed that the late decision of the House of Lords in Jesson v. Wright should be viewed in all its bearings. In proportion as the principles on which it rests are understood and valued, a certain line of cases of a

less satisfactory nature will be thrown into the shade. When the critical state of this branch of the law of Real Property at the period of the above decision is adverted to, it will hardly be thought that, in devoting a distinct section to the examination of this single case, it has been swelled into undeserved importance.

The propriety of some determinations, which appeared to have departed widely from authority and principle, has been freely canvassed. If we are required to engraft upon the text-books which contain the principles of this learning *all* the doctrines of the later cases, the Law of Real Property must cease to exist as a Science. When the question is, whether it shall be stripped of that dignity, or the authority of certain dicta and decisions shall be rejected, the Profession cannot long hesitate, but will quickly be reconciled even to the necessity (if it exist) of controverting the opinions of those to whom all deference is due.

Some matters foreign to the above objects, but which for the most part are connected with the case of Willcox *v.* Bellaers, such as the doctrine of equity concerning doubtful titles, and titles gained by the destruction of contingent remainders, &c. have been incidentally treated.

The Reader should be apprised that the references to the Essay on the learning of Contingent

Remainders are throughout to the marginal paging of the Sixth Edition.

I cannot omit this opportunity of acknowledging the assistance which I have derived during the progress of the work from the suggestions of my friend Mr. Ingram.

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ERRATA.

P. 24, n. for *Peryn* read *Perrin.*

P. 38, n. for *Murthwhite* read *Murthwaite.*

P 84, n. for *Sommers* read *Somers.*

Running title of pages 162, 164, 166, 168, 170, 172, for AS TO THE CONSTRUCTION OF DEVISES read TENDENCY OF MODERN DOCTRINES.

P. 182, n., *et seq.* for *Stoven* read *Stovin.*

P. 209, l. 3, for *Wright* read *Jesson.*

P. 318, l. 15, for *to be a tenant* read *to be tenant.*

P. 383, App. for *Jan.* 20th, 1824, read *June* 20th, 1823.

AN

ENQUIRY,

&c. &c.

SECTION I.

Statement of the Case of WILLCOX *v.* BELLAERS.

Of the Doctrine of Equity concerning doubtful Titles.

MY original design was to have thrown together a few observations, with the view of drawing the attention of the profession to a case (*a*) which seems to affect, in a material point, the law of real property: but of which I may have mistaken the tendency, or over-rated the importance. In the prosecution of that design, I was insensibly led beyond the limits prescribed to my enquiries in

(*a*) Willcox *v.* Bellaers. Rolls, 1823.

the outset; and, though at this moment nothing may present itself to deter me from submitting the result to the profession, I may yet have abundant cause to repent my temerity in adventuring to tread upon such debatable ground. When we call to mind the great names with which the rule in Shelley's case is identified, the profound research, luminous views, and acute discrimination, by which their labours are distinguished, and which cannot be remembered without the deepest sense of professional gratitude; any further attempt to elucidate the learning connected with the rule would appear at once impertinent and presumptuous, were it not that later *dicta* and determinations render it a debt, due no less to their fame, than to the interests of jurisprudence, to exert an effort to combat the new doctrines, and vindicate the old.

The direct tendency of decisions which overturn established legal principles, and substitute distinctions from which no certain principles of general application can be deduced, is, I conceive, to lock up half the landed estates in the kingdom, and plunge the other half in litigation; thereby defeating all the politic provisions of the law for promoting the free interchange of property, and quieting possessions.

Thomas Willcox, being seised in fee of considerable real estates, by his will dated the 3d of April 1783, gave, devised, and bequeathed all and every his freehold, copyhold, or customary messuages,

cottages, closes, lands, tenements, and hereditaments whatsoever, with their and every of their appurtenances, situate, standing, lying, and being in Market Deeping, and Deeping St. James, in the county of Lincoln, and Wymondham and Sewston, in the county of Leicester, or elsewhere in the kingdom of England, unto his son Henry Thomas Willcox, for and during the term of his natural life, and from and after his decease, the testator gave and devised the same to such of his said son's *children*, and in such shares and proportions as his said son should, by his last will and testament, duly executed, limit, direct, and appoint, and to *their heirs;* and for want of such direction, limitation, or appointment, and as to such parts of the said estate, of which no such direction, limitation, or appointment should be made, to the *heirs of the body* of the said Henry Thomas Willcox, *their heirs and assigns* for ever. And in case his said son, Henry Thomas Willcox, should happen to die without issue, then, *from and immediately after* his decease, the testator gave and devised his said estate unto his daughter Elizabeth Willcox, for and during the term of her natural life; and from and after her death, he gave and devised the said estate unto such of her children, and in such shares and proportions, as his said daughter should, by any deed or writing by her executed, in the presence of two or more credible witnesses, either during coverture or after, direct, limit, or appoint, and to their heirs; and for want of such direction, limitation, or appointment, to the

heirs of the body of the said Elizabeth Willcox, their heirs and assigns, for ever. And in case his son should live, and *have children as aforesaid*, then he gave and bequeathed unto his said daughter Elizabeth the sum of 500*l.*, to be paid her by his executors and trustees thereinafter named, on her attaining the age of twenty-one years, or day of marriage. He also gave and bequeathed to his said daughter the further sum of 200*l.*, if she married with the consent of his said trustees, to be paid her on such marriage, but if she married without their consent, the said legacy to be void. He gave and bequeathed to his wife Elizabeth Willcox the yearly sum of 10*l.* to be paid her half-yearly, so long as she should continue his widow, and no longer. All the residue and remainder of his *estate*, after payment of his debts, legacies, and funeral expenses, he gave, devised, and bequeathed unto his said son Henry Thomas Willcox: but if he died before he attained the age of twenty-one years, and without issue, then the testator gave the said residue to his said daughter.

H. T. Willcox (who was not the testator's heir at law) survived the testator; and in 1798, under the advice of Mr. Downing, suffered a recovery of all the devised estates, and limited the use to himself in fee.

He sold and conveyed at different times the greater part of the devised estates, and no doubts were attempted to be raised on the construction of

the will. Having contracted to sell the remainder of the estate in parcels, the counsel for one of the purchasers objected to the title, on the ground of its being very questionable whether, under the limitation to the heirs of the body of H. T. Willcox, his children were not intended to take by purchase; and though it was urged that as he had no issue born before the recovery suffered, the title was good *quacunque viâ;* and though one of the purchasers completed under the sanction of a very respectable opinion to this effect, yet the other purchaser's counsel was clearly of opinion that the title, put as a title depending on the destruction of contingent remainders, could not be forced upon the purchaser. There were several opinions in favour of the title.

The vendor filed his bill for a specific performance, and the Master reported in favour of the title. The plaintiff excepted to the report, suggesting that H. T. Willcox did not acquire the fee simple by the recovery. The exception was fully argued (*b*) before Mr. Baron Graham, and Master Alexander, (now Lord Chief Baron,) and Master Stratford, who, after taking time to examine the authorities, differed in opinion; the now Lord Chief Baron, and Mr. Baron Graham, thinking it very doubtful at least, whether H. T. Willcox took more than an estate for life, and Master Stratford being of a contrary opinion, so that no judgment

(*b*) Rolls, June 1823.

was given. The exception was argued again (c) at considerable length before the Master of the Rolls. The point of the contingent remainders, however, was not much insisted on. His Honour, after looking into the cases, thought there was so much doubt whether H. T. Willcox took an estate tail, that the purchaser ought not to be compelled to take the title; and accordingly dismissed the bill (d).

The acuteness and research displayed by the learned judge, who decided this cause, on points connected with the law of real property, (e) render it the more important to examine into the grounds of this decision.

But before we proceed to a discussion of this case, it may not be irrelevant to enquire briefly into the origin and nature of the doctrine of equity, that a purchaser shall not be compelled to accept a doubtful title.

No such doctrine obtains at law. A court of law pronounces the title good, or bad. This appears to be settled by the case of Romilly, Knight v. James, (f) where Gibbs, C. J. expressed himself in these terms:—"It is said that the plaintiff

(c) Rolls, Dec. 17, 1823.

(d) Feb. 9, 1824.

(e) See Marquis of Cholmondeley v. Lord Clinton 2. Jac. & Walk. 1. Widdowson v. Earl of Harrington, 1 Jac. & Walk. 532.

(f) 6 Taunt. 263. 1 Marsh. 600.

will have made out his claim to recover back his deposit, if a cloud is cast upon the title. But that is not so in a court of law: he must stand by the judgment of the Court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity, it might have been otherwise. I know a court of equity often says, this is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take: but that distinction is not known in a court of law." If, therefore, the title be subject only to that degree of doubt which would prevent the vendor from compelling a specific performance in equity, an unwilling purchaser, having paid a deposit, must submit either to lose it, or abide by his bargain.

As to the origin of this equitable doctrine, Lord Eldon has stated (g) that the law of the Court had altered within his time; that when he first began to practise, the rule was this,—when the Court had once determined that a party was tenant in tail, or tenant for life, with an absolute power of appointment, or any thing else that would enable him to convey a fee simple, free from all charges and incumbrances whatsoever, it would act upon that opinion as incontrovertibly right; that the old course used to be, when a party was dissatis-

(g) 1 Jac. and Walk. 568.

fied with the judgment of the Court, to compel him either to do as the Court required, or to appeal to the House of Lords; not that the opinion of the Lords was decisive, but it gave a sanction to the title, which would probably operate to the security of the purchaser. And his Lordship said, he believed that the first case in which that rule was departed from, was Shapland *v.* Smith; (*h*) and that the last case which went to the House of Lords, was one in which Mr. Morris, a king's counsel, was plaintiff.

But it should seem that the doctrine is of earlier date. Sir William Grant has stated, (*i*) that it was not first introduced by Lord Thurlow, but was at least as old as Sir Joseph Jekyll's time, and was repeatedly acted upon by Lord Hardwicke.

Nor, indeed, does the case of Shapland *v.* Smith appear adequate to the production of so material a change in the practice of the Court. That case was first heard before Baron Eyre, and Masters Holford and Hett, when Master Hett differed in opinion from the other two, and Baron Eyre doubting whether the opinion of the Masters, sitting with the Judge, must concur with his in order to found a decree, the cause stood over to be heard before the Lord Chancellor. On the

(*h*) 1 Bro. C. C. 75. (1780.)

(*i*) 2 Ves. and Beam. 145.

rehearing, Lord Thurlow agreed with Master Hett, whose opinion was against the title, intimating at the close of the judgment, that "if it were only doubtful, he would not oblige the purchaser to take the title." In Cooper v. Denne, (l) Byng, then Lord Commissioner, adverts to Shapland v. Smith in these terms:—"The Lord Chancellor was of opinion, I believe, with Master Hett, that the title was not good; and only threw out what he did as to doubtful titles, *to break the fall of my opinion*: but that is not the single case to shew that where there is a cloud upon the title, the Court will not decree a specific performance." It would be singular, indeed, if a doctrine of so much importance, and of so opposite a character to that which still obtains at law, should have had its origin in a point of courtesy between two judges.

The position that, in order to induce Equity to decree a specific performance, the title must be like Cæsar's wife, above suspicion, (m) appears, with reference to the decided cases, to be rather too strongly laid down. It seems that the Master of the Rolls, Sir John Strange, merely observed that he had *heard* it *said* that a title purchased under a court of equity must be like Cæsar's wife, even without any suspicion. (n) Mere suspicion

(l) 4 Bro. C. C. 88. (1792.)

(m) Sugd. Vend. 265.

(n) Sedgwick v. Hargrave, 2 Ves. 57. (1750.)

and is in its nature cannot be the legitimate ground of legal decision. (o) If titles are to be judged of by the standard of moral purity, it may turn out that some of those which equity has forced upon a purchaser were scarcely less free from taint than Messalina herself.

Lord Eldon, however, has observed (p) that the Court has almost gone the length of saying, that unless it was so confident, that if it had a large sum of money to lay out on such an occasion, it would not hesitate to trust its own money on the title, it will not compel a purchaser to take it.

All the decided cases do not seem to go the full length of these positions; though, with one or two exceptions, they concur in establishing the general doctrine. The nature of the subject precludes any near approach to certainty: but a review of the principal cases may perhaps enable us to draw some conclusions respecting the present state of the doctrine as applicable to titles involving a doubt, either upon a point of law, or matter of fact. (q)

In one of the earliest cases, (r) the question

(o) *Per* Dallas, C. J., cited by Prest. Arg. 1 Turn. 28.

(p) 1 Jac. and W. 569. But see Nouaille *v.* Greenwood, 1 Turn. 29. *infra.*

(q) "All the judges of equity have of late thought it more wise and discreet to send questions of fact to a jury, where any reasonable doubt exists." *Per* Lord Eldon, 6 Ves. 672.

(r) Marlow *v.* Smith, 2 P. Wms. 198. (1723.)

arose upon a recovery, under which the title was believed. The legal freehold was limited to trustees, the survivor of whom devised the residue of his real estate to his wife. The heir, but not the devisee, of the surviving trustee, joined in making the tenant. It was insisted in argument, that if there was the least doubt of the title, (which it was made to appear there was by the opinion of Serjeant Hooper and Mr. Webb,) it would by no means be proper for the Court to compel the party to accept it; for in such case if the purchaser should be sued, he would have no redress; and here the Court would be compelling the party to purchase a special verdict, or a suit. The Master of the Rolls was of opinion that the trust estate passed by the devise; consequently, that there was not a good tenant; and there being the opinion of learned men against the title, he would not, nor did he think it reasonable that a court of equity should compel the purchaser to accept the purchase.

Lord Hardwicke, however, compelled a purchaser to take the title (s) where there was a reservation of mines to the Crown, upon the ground of the improbability of there being any such mines; and that the Crown having merely reserved the mines, without any right of entry, could not grant a licence to enter upon another man's estate for

(s) Eddy v. Weston, 2 Atk. 19. (1739.) And see Sugd. Vend. 6th edit. 210.

the purpose of working them; though Sir W. Grant has intimated (*t*) that this position is liable to considerable doubt.

Upon a sale of copyhold lands, (*u*) the vendor insisted upon surrendering by attorney, and not otherwise, and the purchaser having entered into proofs that the custom required a surrender in person, the Master of the Rolls directed an issue as to the custom. On appeal it was insisted for the defendant, the vendor, that the issue was improper; but Lord Hardwicke saw no ground to vary the decree; for it was the case of a purchaser of an estate, whom no court of justice would compel to accept of such a title upon any doubtful evidence. It was not a question what kind of title a man might have in his family: but what kind of title a purchaser was compelled to take. Upon that question, whether a good title could be made, the Court had directed an issue, that if this might be a good title to the plaintiff by letter of attorney, he might accept of it: but his Lordship said that he would not compel a man to accept of a title under a letter of attorney.

And in a case (*x*) where the title depended on the construction of a very doubtful devise, Lord Thurlow refused to compel a specific perform-

(*t*) 16 Ves. 393.

(*u*) Mitchel *v.* Neal, 2 Ves. 679. (1755.)

(*x*) Heath *v.* Heath, 1 Bro. C. C. 147. (1782.)

ance; and said that for a court of equity to compel a party to take an estate which it cannot *warrant* to him, would be an extraordinary proceeding.

So where objections were taken to the title (*y*) (in favour of which the Master had reported) founded on considerable doubts as to the validity of certain leases, the subject of the contract, granted under the powers of an act of parliament: the Court thought the leases bad so far as they depended on their conformity to the terms of the power; and though the Court inclined to be of opinion, that the leases were confirmed by the operation of a recovery, yet another question arose, whether the continuance of the leases after a recovery suffered, did not depend more on the statute 21 Hen. 8. c. 15., than the recovery itself. Eyre, Lord Commissioner, observed, that in the particular case of a bill for the specific performance of a contract for the purchase of an estate, where there are considerable difficulties on the face of the title, and there are no means of clearing them, and no jurisdiction to bind the question, he thought that was not the case for decreeing a specific performance.

Again, where the judges of the Court of King's Bench, upon a case directed for their opinion, had

(*y*) Cooper *v.* Denne, 4 Bro. C. C. 80. 1 Ves. jun. 565. S. C. (1792.)

certified that the vendor had the absolute interest at law; in the lease in question, the Lord Chancellor remarked, (z) that the particular expression of the certificate was intended as a caution to him; and suggested a trust behind for parties not before the Court; that when he sent it to law, he thought it a very doubtful question, and that he could not force a purchaser to take a title upon which he entertained great doubt. An act of parliament was afterwards obtained for perfecting the title.

Some leasehold houses having been taken under a sequestration, (a) which issued for want of an answer to a bill against a surviving executor and devisee in trust, the plaintiffs prayed that the sequestrators might be ordered to sell the houses: but the Lord Chancellor said, he could not well compel the sequestrators to sell, without at the same time *warranting* the title. The sequestration did not transfer the term to the sequestrators; it was only a process to compel an appearance: he could not compel a man to take a title which he was to support by a bill for an injunction.

But in the next case which occurred, (b) where the title was to be taken under a confused and obscure will, upon which an eminent conveyancer was stated to have said, that it was unsafe for a pur-

(z) Sheffield v. Lord Mulgrave, 2 Ves. J. 526. (1795.)

(a) Shaw v. Wright, 3 Ves. J. 22. (1795.)

(b) Warneford v. Thompson, 3 Ves. 573. (1797.)

chaser to rest, and against which title the Master had reported, a specific performance was decreed, the Master of the Rolls being clearly of opinion, that the will conferred an authority to sell.

One of several trustees for sale (c) not having executed the deed of trust, nor intermeddled in the trusts, and being unwilling to act, conveyed and released all his estate and interest to his co-trustee, and afterwards refused to join in the receipt for the purchase money. Lord Loughborough thought it had been so managed as to amount to an acceptance of the trust; (d) and that though the hazard probably was not great, he did not know how to make the purchaser incur it.

Lord Eldon refused (e) to compel a purchaser to take a title depending upon the presumption of a grant of a portion of tithes from a lay impropriator; the Court of Exchequer having held that there

(c) Crewe v. Dicken, 4 Ves. 97. (1798.)

(d) The trustee should have disclaimed. The old doctrine seems to have required the disclaimer of an estate of freehold to be in a court of record, Butler and Baker's case, 3 Co. 25. But it was lately decided, that a disclaimer by a devisee by deed was effectual, Townson v. Tickell, 3 Barn. and Ald. 31. Holroyd, J. seemed to think that even a deed was superfluous. Crewe v. Dicken, was not cited. See also Nicloson v. Wordsworth, 2 Swanst. R. 365. It may be useful to state, that previously to Townson v. Tickell, deeds of this nature had been executed under sanctions which placed their efficacy beyond doubt.

(e) Rose v. Calland, 5 Ves. 186. (1800.)

could be no presumption upon length of time, even against a lay impropriator, though his Lordship was of a different opinion; but he would not decree the purchaser to enter into a lawsuit, and try his Lordship's opinion at his (the purchaser's) expense.

Exceptions were taken (*f*) to the Master's report in favour of the title, involving many doubtful questions upon the point, whether the limitations in a will, after the estate for life of the plaintiff, the vendor, were contingent remainders, or executory devises; the plaintiff contending that they were contingent remainders; and resting his title upon the destruction of those estates, there being no estate in trustees to support them. The Lord Chancellor said, that if the purchaser were willing to have the opinion of a court of law, he would very willingly send it to law: but he did not know how to compel a purchaser to take a title he must go to law for immediately. Adding, that he did not much like a tenant for life destroying contingent remainders, taking advantage of the want of trustees in the will, and then coming to the court to give a sanction to that title; and asked if any case had occurred in which the court had ever established such a title, and forced a purchaser to take it. His Lordship afterwards observed, that it had been intended to bring a bill into parliament to prevent the necessity of trustees to preserve contingent

(*f*) Roake v. Kidd, 5 Ves. 647. (1800.)

remainders: but that this intention was never carried into effect.

The observations thrown out by the Court in this case have given rise to an opinion, that titles acquired by the destruction of contingent remainders cannot be forced upon a purchaser. This point will be considered in discussing the case of Willcox *v.* Bellaers.

In a case (*g*) where the purchaser had raised a question of legitimacy, the Lord Chancellor observed "The first objection which I shall consider is, that there is such reasonable ground of doubt whether the alleged tenant in tail was legitimate, that the purchaser will not have such a title as this Court will call upon a purchaser to take, if a doubt of so high a nature exists. I admit there are many cases in which a jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that this Court would not compel a purchaser to take it, merely because there was such a verdict. The Court ought to weigh whether the doubt is so reasonable and fair, that the property is left in his hands not unmarketable."

The late Master of the Rolls decreed a specific performance, (*h*) where the legal title depended on the presumption of a reconveyance, founded on

(*g*) Lord Braybroke *v.* Inskip, 8 Ves. 428. (1803.)
(*h*) Hillary *v.* Waller, 12 Ves. 239. (1806.)

length of time, the other circumstances not favouring the presumption; and this decree was affirmed on appeal by Lord Erskine.

A title being objected to (*i*) on the ground of an act of bankruptcy by the vendor, in executing, with a view to the sale, a deed containing an assignment of all his effects; though it did not appear that there was any debt to support a commission: the Master of the Rolls thought that until the time fixed by the act of parliament had expired, it was extremely difficult to give the purchaser any assurance that he had got an available title; not merely a marketable title, but one which he could take with reasonable safety; and that it would be hard to oblige the purchaser to take a title, which the Court could not *warrant* to him.

In the above case there was no defect in the title, properly speaking: but the opinion of the Court was that the party could not give the estate, as it might ultimately turn out to be the estate of the assignees. And the Court is in the same situation whether the vendor or vendee applies for execution of the contract; for where the vendee has committed an act of bankruptcy, there is just the same inability to give a secure title to the purchase money, as there was in the above instance to give a secure title to the land. (*k*)

(*i*) Lowes *v.* Lush, 14 Ves. 547. (1808.)

(*k*) See Franklin *v.* Lord Brownlow, 14 Ves. 557.

It should seem to be a sufficient ground of objection that the written evidence of title does, upon the face of it, import an equivocal title to the subject of the contract, although the inference it raises against the title be repelled by extrinsic evidence. For in a case (*l*) where the title was derived under a will devising the testator's undivided moiety or half part of the dwellinghouse, &c., and all other his shares, proportions, and interest, if any, in the premises, to the vendors in trust for sale, the Master reported in favour of the title: but the Lord Chancellor considered this a very singular description by a person persuaded that he had the entirety. And though it appeared by the evidence before the Master that the cause of the doubt was accounted for; and there was no circumstance shewing that the testator had not the entirety; and if he had, the words were sufficient to pass it; yet his Lordship did not feel satisfied that this was a reasonably clear marketable title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. His Lordship alluded to the former habit of the Court; and said the course had varied entirely; and it had been held repeatedly, that though, in the judgment of the Court, the better opinion was that a title could be made, yet if there was a considerable or rational doubt, the Court had not attached so much credit to its own opinion, as to compel a purchaser to take the title.

(*l*) Stapylton v. Scott, 16 Ves. 272. (1809.)

The principle of this decision should, I apprehend, be applied in practice with considerable caution. The case was a peculiar one; and there was probably some feature in the evidence adduced to remove the doubt, unfavourable to the title as a marketable commodity.

In a case (*m*) where the estate could only be conveyed, either under a power of sale contained in a settlement, made under a reference to the Master to approve of a proper settlement, pursuant to the directions of a will, which did not authorize the insertion of such a power; or under the powers of a former settlement, of which the object and purpose appeared to have ceased; the Master of the Rolls held that a good title could not be conferred by an exercise of the first power, which appeared to have been inserted in the settlement without the sanction of any direction by the testator, or the Court; and that, as to the power in the former settlement, it would be attended with ill consequences to put purchasers upon exercising a very nice and critical judgment with regard to the purposes for which powers had been created; and he thought that the proposed exercise of the power for a purpose wholly foreign to the settlement would be an undue exercise of it.

In the following case, (*n*) Lord Eldon appears to

(*m*) Wheate *v.* Hall, 17 Ves. 80. (1809.)

(*n*) Biscoe *v.* Perkins, 1 Ves. & Beam. 485. (1813.) And see 1 Jac. & W. 569. *n.*

have proceeded upon what he has stated to have been the practice of the Court when he first entered it. Trustees for preserving contingent remainders joined with the tenant in tail, after he came of age, in suffering a recovery. The Lord Chancellor, after commenting upon the difficulty of ascertaining the result of the cases, as to the duties and liabilities of trustees to preserve contingent remainders, said that as he did not find here what he could call a breach of trust, the contract must be performed; and he would not go the length of saying that this was a case in which, notwithstanding the observations he had thrown out, and though such was his opinion, he could not compel the purchaser to take the title: but he would compel the purchaser to take it, unless he would reverse the opinion of the Court, which was formerly the course, instead of letting off the purchaser upon a doubtful title.

Where the doubt turned (o) upon very nice learning as to the doctrine of escrows, connected with the facts as they might turn out in evidence, the cases raising nice distinctions upon the effect of acts and expressions at the time of the execution, Sir W. Grant, after adverting to the nature of the questions which might arise, observed, that without absolutely deciding each of those questions it was sufficient to say, that there was so much doubt upon them, that the Court would not compel a

(o) Sloper v. Fish, 2 Ves. & B. 145. (1813.)

purchaser to run the hazard of their decision. It had been said that every title was good or bad, and that the Court ought to know nothing of a doubtful title: but the Court had adopted a different principle of decision.

We may collect, however, from the two following cases, that the Court will sometimes enforce a specific performance, even where the title depends upon the construction of a devise which raises a question of some difficulty.

Freehold estates were devised (*p*) to G. T. B. for life, without impeachment of waste, with remainder to trustees during his life to preserve contingent remainders, and after his decease to the heirs of the body of G.T.B.; and for default of such issue over. A power was given to G. T. B. with the consent of the trustees to appoint a jointure. By a codicil the testator devised a messuage and premises held by lease for years (the subject of the contract) to trustees, for such estate and estates, and in such manner and form, as his real estates were devised by his will. It was clear that G. T. B. took an estate tail in the freehold, but it was contended on behalf of a purchaser of the leasehold, that there was a clear *intention* that G. T. B. should take only a life estate in the freehold, and that by the effect of the words of reference in the codicil, the same intention was manifested as to the leasehold, the reference

(*p*) Brouncker *v.* Bagot, 19 Ves. 574. 1 Mer. 271. (1816.)

being not to the legal effect, but to the estates intentionally given by the will; and that the rule of law, which contravened the intention in respect to the freehold did not govern the leasehold; and it was insisted that the codicil was to be read as if it contained an original devise of the leasehold, in the same words as were used in the will with regard to the real estate: but Sir W. Grant held, that the devise of the leasehold vested it absolutely in G. T. B. according to the rule of law, that what makes an estate tail in real property constitutes an absolute devise of a chattel interest; that the testator had not said what he considered to be the *effect* of the words used by him in devising the real estate; and that the law having said those words should *operate* an entail, there could be no substantial difference between the actual use of the words in the one case, and employing them by way of reference in the other; and that the testator, if he had made a distinct disposition of the leasehold, could not with propriety have used all the same words, and that those which are inapplicable must be omitted. His Honour, therefore, had no hesitation in saying that a good title could be made.

If it be admitted that a testator is not to be supposed conusant of the effect of technical rules of law, (q) then there was in this case a manifest in-

(q) "One cannot but be rather astonished at hearing grave and learned men reason that testators are acquainted with the

tention that the leasehold should not vest absolutely in the intended tenant for life of the freehold, and the impossibility of giving effect to the intention as to the one species of property, was not alone a sufficient ground for denying it effect as to the other; for though the testator might wish the estates to go together, yet it did not appear that he meant, if the law, as to the freehold, took one course, and his intention another, that the leasehold should follow the law. The question therefore seemed to be, whether the intention did not require the Court to mould the trusts of the leasehold in conformity to the expressed limitations of freehold.

And in a case (r) before Sir Thomas Plumer, when Vice-Chancellor, where a testator had devised to his wife and her heirs certain freehold and copyhold hereditaments, in trust thereout to pay his debts, &c.; and then upon further trust that she should enjoy the estates during her life,

rules and effects of contingent remainders, and yet not know how to give a contingent remainder in the common form." *Per* Lord Thurlow, 1 Bro. C. C. 206.

I think there is a fallacy in the argument, for it supposes that the testator knew the consequences of all the words which he had used. The same argument was urged in the great case of Peryn v. Blake, and in the Exchequer Chamber Mr. Baron Perrott exposed the fallacy of it; and it was argued that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life, or tenant in tail." *Per* Lord Alvanley, 2 Bos. & Pul. 594.

(n) Marshall v. Bousfield, 2 Mad. 166. (1817.)

and after her decease, that the same should be settled by able counsel, and go to and amongst his grandchildren of the male kind, and their issue in tail male, and for want of such issue, upon his female grandchildren, *which should be living at his decease*: but the testator declared, that the shares and proportions both of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and for want of such appointment, to the testator's own right heirs for ever. The wife by her will appointed the premises in question to N. J. F., and the heirs male of his body. The only account of the first will was a *recital* in the second. At the date of the first will, there was only one male grandchild: but two more, of whom N. J. F. was one, were born before the date of the second. It was objected that the first will created an executory trust, under which N. J. F. would be made tenant for life, with remainder to his issue, in a course of strict settlement; to which it was answered, that a man could not give an estate for life to a person not *in esse*, at the death of the testator; and it was stated that in an important case, on the Duchess of Marlborough's will, not then in print, (but of which the profession has since been favoured with a correct and copious note) (*r*) Lord Northington said, "A man, who is not by law allowed to lock up property, cannot by a power give to another a key to lock it up." His Honour

(*s*) Duke of Marlborough v. Earl Godolphin, Eden 404.

was of opinion, that the words "in tail male," applied to the grandchildren, and that no language was used which had been held in other cases to be indicative of an intention to give only an estate for life; that unless the grandchildren took an estate tail, the limitation, so far as respected N. J. F. who was born after the testator's death, would be void, as being too remote; and that the only mode of giving an estate tail male to the children would be by giving an estate tail male to the parent, which, unless barred, would descend on his issue; and that this was the only way in which this executory trust (for such his Honour admitted it to be) could be carried into execution. His Honour therefore held that the *intent* was to direct a settlement to the grandchildren in tail male, the proportions to be named by the wife, and that a good title might be made; adding, that he did not impeach the principle that the vendee is not bound to take a doubtful title. In support of this construction his Honour referred to Blackburn *v.* Stables, (*t*) and Roe *v.* Grew. (*u*)

This appears to be rather a strong-featured case. The contents of the first will were collected from a recital in the second. The words, "which should be living at his decease" might perhaps, without offering much violence to the context, have been applied to the male, as well as the female grand-

(*t*) 2 Ves. & Beam. 367.

(*u*) 2 Wils. 322. *Infra*, Sect. VII.

children; (v) and supposing that to be the true construction, the title was bad. It can hardly be contended, that a more formal settlement (which according to the established doctrine would be a strict settlement (x)) was not contemplated. The will was to fix the proportions to be so settled upon each stock. On any other supposition, the words, so anxiously providing the assistance of able counsel, (y) were thrown away. The testator had not taken upon himself to be his own conveyancer. He could not mean a settlement in the very words and form, which he had employed. But if male grandchildren born after the testator's decease were within the gift, the opinion of the Court as to the estate taken by N. J. F. may be supported on another ground, — the doctrine of *cy-pres*. In the case of Humberstone v. Humberstone, (z) where the trust was to convey lands to A. for life, then to his first son for life, then to the first son of such son, &c.; remainder to the second son of A., and his first son, &c.; the Court approached as near to the intent as the rule against perpetuities would allow, by directing a strict settlement upon such sons of A. as were living at the testator's death, and limiting an estate tail to his after-born sons. Roe v. Drew, which was the case of an executed legal devise, not transgressing the limits respecting per-

(v) See 2 Ves. 249. 1 Eden 119.

(x) *Infra*, Sect. VI. note on executory trusts.

(y) See Bastard v. Proby, 2 Cox's Ca. 6.

(z) 1 P. Wms. 332. 2 Vern. 737. Prec. Chan. 455. as explained 4 Ves. 332. 1 Eden. 422.

nuities, seems to have had no obvious application; and the doctrine laid down in Blackburn v. Stables must not, after what has fallen from Lord Eldon in Jervoise v. Duke of Northumberland, (a) be too hastily admitted, as an accurate statement of the principles applicable to the construction of executory trusts. (b)

In a case (c) where the Master reported against the title on the ground that a certain deed, whereby the premises in question, together with certain personal chattels, had been conveyed and assigned by the owners, who were traders, upon trusts for sale for securing money, and under which deed the premises were sold, amounted to an act of bankruptcy; the Vice-Chancellor was strongly inclined to think that the Master was wrong, and that where the delay of possession of personal chattels is consistent with the deed, and the deed is made upon good consideration, and *bonâ fide*, it does not become an act of bankruptcy by reason of such delay of possession. If, however, the case turned upon that point, his Honour would not bind the purchaser upon a question of legal title by his opinion, but would send the case to a court of law. But as the *bona fides*, and consequently the validity of the deed, might depend upon ex-

(a) 1 Jac. & Walk. 550. *Infra*, Sect. VI. *n*.

(b) As to purchasers not being affected by an equity arising out of the construction of doubtful words, see Cordwell v. Mackrill, 2 Eden 344. Parker v. Brooke, 9 Ves. 588.

(c) Hartley v. Smith, 1 Buck's Ca. 363. (1819.)

trinsic circumstances of conduct, which it was neither in the power of the purchaser or the Court to reach, his Honour thought that a court of equity ought not to compel the purchaser to accept the title.

We have seen that a purchaser has been compelled to take a title resting on presumption. A very recent decision (*d*) affords another strong instance. By letters patent 37 Hen. VIII. the scite of the cell or monastery of Bamburgh, with its rights, to the late monastery of St. Oswald, then dissolved, formerly belonging, was granted, "except always, and to the King and his successors reserved, all and singular the advowsons, donations, presentations, and rights of patronage whatsoever, to the said cell and premises belonging or appendant." By letters patent 8 James I. the tithes of sheaf and grain, renewing in Belford, formerly parcel of the late cell of Bamburgh, and to the late dissolved monastery of St. Oswald belonging, were granted, with a similar reservation of all advowsons, &c. The origin of the vendor's title to the advowson of Belford did not appear; the advowson was included in a recovery of 1709 suffered by persons who claimed under a will dated in 1681, which will did not mention the advowson. It was comprised in several subsequent assurances. In 1774 the curacy of the chapel of Belford was augmented, with the consent of the governors of Queen

(*d*) Gibson *v.* Clark, 1 Jac. & W. 150. (1819.)

Anne's bounty, by the patron (under whom the vendor claimed) and three presentations had been made by him, and his representatives, in 1775, 1792, 1803. In the episcopal registry no presentation was to be found earlier than 1775. The Lord Chancellor was of opinion, that if the title of the family were evidenced by conveyances and deeds for a period of nearly one hundred and forty years, and there had been three presentations by them, and none by the Crown, this was a case in which a grant would be presumed, and over-ruled the exception to the Master's report, which was in favour of the title.

Nor will the mere circumstance that the profession is divided in opinion upon a point, be sufficient to stamp the title with the character of doubtful. For in a late case (e) before the present Vice-Chancellor, his Honour compelled the purchaser to take a title depending on the destruction, by the tenant for life, of a power of appointing to his children, it appearing to him, as the result of the authorities, that such powers might be extinguished by the donee.

And in a later case (f) upon appeal from the Vice-Chancellor's decree, allowing exceptions to the Master's report against the title, Lord Eldon considered that where an equitable tenant in-

(e) Smith v. Death, 5 Mad. 371. (1820.)
(f) Nouaille v. Greenwood, 1 Turn. 26. (1822.)

tail makes a mortgage in fee, and afterwards suffers a recovery, without the concurrence of the mortgagee in making the tenant, the want of such concurrence is not a sufficient ground of objection to the title. Yet the point had been treated as doubtful. (g) It appeared that the estate had been in mortgage to Sir S. Smythe, one of the Barons of the Exchequer; and his Lordship thought it would be a strong thing to say that the title was not then examined, and that we ought to give credit to men of eminence in the profession who were dealing for their own security. Upon this it must be observed, that the acuteness of great lawyers in relation to their own legal concerns has never been the subject of eulogy. Although it could not be said that ingenuity might not find objections to the title, yet his Lordship thought there was no doubt that it was better than ninety-nine out of a hundred.

It will appear from these decisions, that, although the general principle is well established, and probably grew up with the jurisdiction of equity for the specific performance of contracts, it has not always been applied with uniform strictness: but purchasers have in some instances been compelled to take titles, which the Court could not warrant to them, and which were far from being above suspicion.

(g) See Butl. Fearn. C. R. 59. n. "Upon this point great opinions have differed, and still continue to differ."

The principle has not been pushed so far as to preclude the Court from determining even much agitated points, on which a difference of opinion has long existed in the profession. If the Court sees that the doubt has no foundation in authority, or principle, that it is not a rational and considerable doubt, it will not submit its own judgment to the floating opinion of others.

The Court has never said that a specific performance shall not be decreed because the title depends on abstruse learning, or subtle distinctions, to be collected from a mass of authorities, provided the result of that learning, and those authorities, diligently examined, be clearly in favour of the title. This can no more be a valid ground of objection, than that the muniments of title are voluminous, and intricate. If, indeed, the acknowledged principles and application of the authorities in point do not exclude a moral probability that different judicial minds, fully possessed of the law of the case, might arrive at different conclusions; then, however strong the opinion of the individual judge may be, he will not decide a litigable question, where his decision would not be final. The doctrine, thus stated, will appear to lodge an abundant discretion in the judge, if it be considered that the opinion of the Court in every case will depend, not only upon its own powers and perceptions, but its estimate of the powers and perceptions of others, and that the serious doubts of one judicial mind may be the sport of another.

In suits for the specific performance of contracts, it is always in the discretion of the Court whether a specific performance shall be decreed or not. (i) The Court is at liberty to look into the circumstances, and see whether in all respects it is fit to interpose, and whether the conscience of the Court is bound; (k) there being a marked distinction between a bill seeking a specific performance, and a bill seeking to set aside an agreement: but still this discretion, like every other discretion vested in the Court, must be, in some measure, under the guidance and controul of precedent. It is not an arbitrary, capricious, discretion: but must be regulated upon grounds that will make it judicial. (l) For though it be true, that equity is to be administered "*secundum discretionem boni viri;*"—yet when the question is asked, "*Vir bonus est quis?*"—The answer is,—"*Qui consulta patrum, qui leges juraque servat.*" (m)

There is, perhaps, no discretionary power entrusted to the Court which the interests of a commercial nation require to be exercised with more circumspection. An undue leaning to either side must be alike unfavourable to the free circulation of property. But when we consider that the necessities of mankind often compel them to sell,

(i) 4 Bro. C. C. 87.
(k) 1 Cox's Ca. 406. And see 2 Cox. 77.
(l) 7 Ves. 35. *Per* Lord Eldon.
(m) 2 P. Wms. 753. 1 Eden 214. 1 Fonb. Eq. 5th edit. 23 *n.* (*g*).

while inclination more frequently leads them to purchase, and that in nine cases out of ten the objection proceeds from an unwillingness to fulfil a contract deliberately entered into, rather than an apprehension of being disturbed in the enjoyment, or impeded on a resale, it seems reasonable that a court of conscience should incline, if any bias be allowable, in favour of the title. Estates are not only withdrawn from commerce, but the ownership is in a great measure suspended, till they are not unfrequently rendered worthless for the purposes of enjoyment, in consequence of that excess of refinement to which the ingenuity of later times has wrought up the law concerning the evidence of title; and which stands opposed to the soundest policy, and the best interests of the country.

SECTION II.

Construction of the Devise in Willcox *v.* Bellaers.

General Principles applicable to "Heirs of the body" *in Devises.*

Powers of appointment consistent with Estate Tail in the Donee.

Of necessary Inference or Implication.

Of Words of Limitation in Fee engrafted upon "Heirs of the body."

Of Words introducing an Ulterior Disposition.

The devise in Willcox *v.* Bellaers operated either to give an estate tail to H. T. Willcox, with a power of appointing among his children; (*a*) or, to give him an estate for life, with a like power, with a contingent remainder to his children in fee, (reading "heirs of the body" as synonimous with "children,") with alternative contingent remain-

(*a*) It is observable, that on the execution of the power, the appointees would have taken the fee by force of the devise, and that the donee had no option as to the quantity of interest to be taken, but was merely to determine the shares. This circumstance was insisted upon in argument: but any inference to be drawn from it must be purely conjectural. No arguments are offered as to the effect of the recovery in extinguishing the power, because that point must be considered as set at rest by the decision of the Court in Smith *v.* Death, 5 Mad. 371; by the reasons advanced by Mr. Sugden, Treat. Pow. 3d ed. 73., and by the general sense of the profession.

ders to the daughter and her children, constituting what is termed a contingency with a double aspect. (*b*)

If H. T. Willcox took an estate tail, the recovery of course acquired the fee; and if he took for life only, the remainders to his children, and to the daughter and her children, (which, as he was a bachelor at the time of suffering the recovery, were all in a state of contingency) were defeated by the destruction of the life estate, by which they were supported; and the vested remainder in fee, (*c*) which passed to him under the

(*b*) Fearn. Cont. R. 293.

(*c*) It is clear that so much of the fee as was not immediately disposed of under the limitations, (and an estate for the life of Willcox only was so disposed of,) would, in the absence of a residuary devise, have descended to the testator's heir, subject to be divested by the happening of the contingency, Fearn. C. R. 274. This portion of the fee, being previously disposed of in *event* only, passed by the residuary devise; it was properly a remainder. The effect, I apprehend, would be precisely the same, if the devise were to A. for life, remainder to him in fee: but if A. shall have children, then, from and after his decease, to such children in fee; and in default of children, then, from and after his decease, to other objects. These latter limitations would, I conceive, be alternative contingent remainders. By changing the order of the devises we do not change the nature of the estates. It must be immaterial whether the immediate fee, expectant on the life estate of the first taker, passes by a residuary devise, in a subsequent part of the will, or by a specific gift which immediately follows the limitation for life. The juxtaposition of the gift for life, and of the vested remainder in fee, cannot exclude, or affect, the construction of the contingent limitations. Indeed it may be a question whether this

residuary devise, (*d*) was reduced into possession, discharged of all the limitations of the will. On

would not be the more accurate mode of framing the disposition, as it seems to convey a clearer idea of its legal effect. According to the language of the Court in Plunket v. Holmes, Sir T. Ray. 28. A. would have the fee in such sort as not to confound the life estate, but that there would be an *hiatus* to let in the contingency when it happened.

In most of the cases to be found in the books, where the fee has been gained by the destruction of contingent remainders, the person destroying them took the immediate fee by descent as heir at law of the testator. As in cases circumstanced like Willcox v. Bellaers, it is often doubtful whether the devise creates an estate tail, or an estate for life, with contingent remainders, a recovery is the usual assurance; and the expression "*barred* by the *recovery*" is sometimes used in speaking of the destruction of the contingent estates; (see Denn d. Webb v. Puckey, 5 T. R. 299.) But this expression conveys an erroneous idea, inasmuch as the remainders are excluded by the coalition, by the act of the party, of the estate for life, and the immediate remainder or reversion in fee; and this effect (as is well explained by Mr. Butler, Fearn. C. R. 6th edit. 321. *n*), would equally result from a common conveyance by lease and release. I have noticed this point, because it has occurred to me in practice to find that persons, not thoroughly conversant with the doctrine, have been misled by this inaccurate language. It might lead parties into the fatal mistake of destroying the life estate and contingent remainders, and accelerating the right of an adverse vested remainderman or reversioner. If the tenant for life has the immediate vested fee, either by descent, or under a specific or residuary devise, or by any other means; or if it be vested in another person willing to concur; the contingent remainders may be defeated; and, as it is conceived, a clear *marketable* title to the fee simple acquired by an ordinary conveyance. But this observation must, of course, be confined to devises of the *legal* estate.

(*d*) Doe d. Wells v. Scott, 3 Maul. and Sel. 300.

either construction, therefore, it is conceived that H. T. Willcox had a clear title. (e)

The only mode of defeating his title, would be to construe the devise as giving him an estate for life, with a contingent remainder to his children in tail, (f) in which case the remainders over, being limited after an estate tail only, would of course be vested, and be reduced into possession by the operation of the recovery. But there is clearly no room for this construction.

If any proposition in law be capable of demonstration, the proposition that H. T. Willcox took under this will an estate tail appears to be demonstrable.

That a legal limitation to heirs of the body, uncorrected and unexplained, and preceded by a legal freehold in the ancestor, cannot operate by purchase; (g) that an express declaration (h) that

(e) See 1 Smith 392.

(f) Doe v. Reason, cited 3 Wils. 244. Smith v. Horlock, 2 Marsh. 405. 7 Taunt. 429. Murthwhite v. Barnard, 2 Brod. and Bing. 623. (Qy. this case.)

(g) Shelley's case, 1 Co. 93. As the rule seems to have been lost sight of in the modern cases, it may be useful, or at least entertaining "as a matter of curiosity," (5 T. R. 306.) to state it as laid down in the case from which it takes its name. "And as to what hath been objected, that forasmuch as the limitation was to the heirs males of the body of Edward Shelley, and the heirs males of the body of such heirs males, the heirs males of the body of Edward Shelley should be purchasers; for otherwise the

the ancestor shall take for life, and no longer, (i) and the heirs of the body an estate in remainder, as purchasers, (k) is wholly ineffectual to exclude the application of a rule of law, which has for its essence and object the disappointment of that intention; that to establish an intention that heirs of the body, as such, shall take by purchase, after an estate of freehold in the ancestor, is, in effect, to supply the very circumstance which imperatively demands the application of the rule; (l) that the idea of a class, or denomination of persons, to take in a course of succession ordained by law, is so annexed and appropriated to the words "heirs of the body," that the mind with difficulty reconciles itself to any other interpretation; (m) that an intention to use the words in a sense different from;

subsequent words would be void; the defendant's counsel answered, that it is a RULE OF LAW *when the ancestor by any gift or conveyance takes an estate of freehold; and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee, or in tail; that* always, *in such cases, the heirs are words of limitation of the estate, and not words of purchase.* So inasmuch as in this case Edward Shelley took an estate of freehold, and after an estate is limited to his heirs males of his body, the heirs male of his body *must of necessity take by descent, and cannot be purchasers.*"

(h) Harg. Tracts 562. But see 1 Eden 366. *Infra*, Sect. VI.

(i) 2 Lord Ray. 1440. Thong *v.* Bedford, 1 Bro. C. C. 313. Roe *v.* Bedford, 4 Maul. and Sel. 362.

(k) Papillon *v.* Voice, 2 P. Wms. 471. Coulson *v.* Coulson, 2 Stra. 1125. And see 1 Eden 365.

(l) Prest. Est. 282.

(m) See Lord Holt's opinion quoted in Goodtitle *v.* Herring, 1 East. 164. See also 3 T. R. 493. 5 T. R. 306.

or opposite, to this their legal and natural import can never be inferred from the words themselves (*n*) nor merely from an intention, however manifest, to use them as words of purchase, but that their application must be directed, and confined, by express words, or necessary inference or implication, to objects of a particular designation, as the individual heir at the decease of the ancestor, sons, children, &c.; (*o*) that expressions which do not refer to the objects to take, but the mode of taking, which do not disaffirm the intention, that a class of persons is designed to take in the character of heirs of the ancestor, but merely assume to regulate the course of devolution, are to be rejected, as incompatible with a gift to all the declared objects of the testator's bounty; (*p*) and that the words "heirs of the body," operating unexplained as words of purchase, vest the estate in the person first sustaining the character of heir, with a capacity of transmission through the whole line of heirs of the body of the ancestor. (*q*) All these are principles, so clearly deducible from the rule in Shelley's case, and a long train of judicial readings upon that rule, that it may seem idle to repeat them here, and worse than idle to suppose that their authority, in cases falling within the

(*n*) Hodgson *v.* Ambrose, Dougl. 343.

(*o*) Jesson *v.* Wright, 2 Bligh. 1. *Infra* Sect. V.

(*p*) *Ib.* and see Poole *v.* Poole, 3 Bos. and Pull. 620.

(*q*) Mandeville's case, Co. Litt. 26. *b.* Southcot *v.* Stowell, 1 Mod. 226. 237. Freem. 216. 225.

scope of their application, can ever be the subject of judicial doubt.

Yet, in truth, it is at the very being of these principles, and of the rule itself, that those determinations, which, under covert of zeal or tenderness for the intention, build distinctions on circumstances too feeble to support them, and elude the operation of the rule, without denying its authority as a settled rule of property, are obliquely levelled; and at the very instant in which the Court of King's Bench declared, in Doe dem. Strong v. Goff, (r) that, as their judgment proceeded on the special circumstances of the case, it would not interfere with former decisions; they were aiming a mortal blow at the established sense of the words "heirs of the body," and thereby essaying to shake one of the pillars of the rule.

It may be safely assumed that the words "heirs of the body" were never employed, by any testator, as strictly synonimous with children. The great majority at least of testators annex to those words an idea, which is not satisfied by that *translation*, (as it has been termed, (s) but, in fact, *substitution* of another term;) and something, amounting to demonstration plain, should be required to shew, that they are used to designate objects whom, whether we regard their legal or

(r) 11 East. 668.

(s) *Per* Lord Ellenborough in Doe v. Jesson, MSS.

natural acceptation, they so inaptly and untruly describe. To stamp the words with this meaning, it should clearly appear on the face of the will, not only that the testator used them as words of purchase, but that the very objects whom the term imports were not in his contemplation, to take either by purchase or descent; that the idea of *child* existed in his mind unassociated with that of *heir*. This position, if not fully borne out, as I conceive it to be, by the decision of the House of Lords in Jesson *v.* Wright, (*t*) seems to be so clearly founded in law and reason, that to deny it must involve a denial of some of the first principles of legal and rational interpretation.

The circumstances, from which the arguments to disprove the proposition, that H. T. Willcox took an estate tail, must be drawn, are,—1. The power given to him of appointing among his children. 2. The words "their heirs and assigns" superadded to the words "heirs of the body." 3. The words introducing the devise over to the daughter, and her issue. 4. The legacy given to the daughter, in the event of the son's living, and having children "as aforesaid."

I. The circumstance of a power being given to a devisee, authorizing acts within the scope of that ownership which an estate tail confers, has never been admitted as a valid argument against a con-

(*t*) *Supra*, 40.

structive estate tail in that devisee; much less can it be allowed to control the fixed operation of an express gift to heirs of the body. In Seale v. Barter (u) Lord Alvanley observed:—"It was argued that the power would be altogether unnecessary, if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail: but it may be observed that the power adds some operation, since it enabled the devisee to dispose of the estate to his children, without going through the forms of a recovery."

And in the late case of Jervoise v. The Duke of Northumberland, (v) Lord Eldon stated his sentiments upon this point in strong language. "It cannot be doubted" (said his Lordship) "either upon principle or authority, that such powers as these, (powers of portioning) may be given, and usefully given, to a tenant in tail; and that in

(u) 2 Bos. & Pull. 485. The testator declared his will to be that all his lands and *estates* should after his decease come to his son J. S., and his *children* lawfully to be begotten, with full power for him to settle the same by will or otherwise on them or any of them as he should think proper, and in default of such issue, over. The testator had no child at the time of making his will. Held an estate tail in J. S., with a power of appointing to his children in fee.

(v) 1 Jac. and Walk. 559. Stated and considered *infra*, Sect. VI. (n)

many cases powers are given (which in one sense may be said to be given unnecessarily) to a tenant in tail; but which, enabling him to do certain acts more expeditiously, more certainly, and in a less expensive way, and to do those acts, though he does not think it proper to destroy the estate tail, (*w*) may be quite consistent with his having an estate tail. But then, thinking on the safety of a purchaser, it must be recollected, and it cannot be doubted, that such circumstances may have considerable weight with many judicial minds, and a greater weight than they have with me." The concluding sentence must not be understood as an admission, that powers of this nature can furnish even a reasonable ground of doubt, where the words of the devise are such as would clearly create an estate tail. In the case which called forth these observations, the devise was open to different constructions; and his Lordship, inclining to regard the words "to be intailed" as directory, pointing therefore at a strict settlement, merely meant to say, that by some judicial minds the power might be thought to strengthen that indication. These observations, which went to lay the powers out of consideration, even in a case where the question was, whether an executory trust was created, (cases in which such powers appear to have sometimes

(*w*) Those who rely upon the power, forget the principle that the law looks to the continuance of estates, and presumes that the first taker at least will not defeat the intail. This principle is remembered for another purpose. *Infra*, Sect. VII.

exerted a degree of influence) shew very strongly the low estimate formed by his Lordship of arguments drawn from such a source.

Indeed, no judicial mind can attribute any importance to the introduction of such powers, (except, perhaps, in combination with other circumstances, of a less equivocal character) without disturbing a long train of authority, in which they have been pronounced quite consistent with the intention of giving an estate tail to the donee.

In Broughton *v.* Langley (*x*) it was resolved, "that a power to make a jointure does not necessarily exclude an estate tail, or intent to give it, because tenant in tail, without discontinuing or barring the intail, cannot make a jointure; and so this power has its use."(*y*) There are numerous authorities in the books to the same effect; and even powers to grant leases, which tenants in tail are enabled to make by statute, have not been allowed to repel the intention to give an estate tail to the donee of the power. (*z*)

(*x*) 2 Salk. 679.

(*y*) It has been suggested to me that there may be cases in which such a power would be extremely useful, as where tenant in tail, with remainders over, marries in vacation, of which an instance occurred in practice. The intail being legal, so that the wife would be dowable, the object was secured as far as possible by putting her on the one hand, and the issue in tail and the remaindermen on the other, to their mutual election; dower against jointure.

(*z*) Bale *v.* Coleman, 2 Vern. 670. 1 P. Wms. 142.

The power in this case is to appoint to children; and, in default of appointment, the estate is limited to the heirs of the body. It is clear that children, taking by appointment, must take as purchasers; and it is thence attempted to be inferred, that the objects to take in default of appointment must also have been intended to take in that quality.

It may be admitted that the testator did intend the objects of the gift in default of appointment to take by purchase; nay, that he has clearly expressed such an intention, without at all advancing the argument against an estate tail in H. T. Willcox; for, in order to exclude the rule, there must be a clear indication of intention, not merely that "heirs of the body" shall operate as words of purchase, but that they shall so operate in favour of objects whom the law can recognize as purchasers under that designation; since, if the intention be that the class or denomination of persons, of whom the term is properly descriptive, shall take under it, the law will immediately fasten upon that intention to vest the inheritance in the first taker; and the more apparent such intention is, the more stubborn and inflexible the rule will become.

That the term "heirs of the body" *may* be used in a will, not merely in a qualified or limited sense, but in a sense foreign to its legal and natural signification, as descriptive of other persons than heirs,

is not denied (a). A testator may pervert and misapply the language of the law: but a testator, speaking that language, must be understood to speak it according to its fixed and acknowledged import, unless he distinctly apprise us of his intention to use its words and phrases, as the signs of other ideas than those, which authority and usage have annexed to them. (b) This must not be left to presumption or probable inference, (c) but must be placed beyond all doubt; and in proportion as the words have a more certain and appropriate meaning, stronger evidence will be required to force upon them a different signification.

There is no word in our law, of which the sense is better ascertained, or ought to be more sacred, than the word "heirs." A testator intending to

(a) Lisle v. Gray, 2 Lev. 223. Lawe v. Davies, 2 Ld. Ray. 1561. Goodtitle v. Herring, 1 East. 164. But see Poole v. Poole, 3 Bos aud. Pull. 620. (all stated and considered, *infra*, Sect. III.)

(b) "It would confound the use of all language, and introduce the greatest barbarity and confusion, to make words stand for ideas, in opposition to the sense which usage has put upon them." *Per* Wilmot, C. J., Wilm. 272.—Mr. Fearne, in an admirable opinion on the validity of an equitable recovery, 1 Coll. Jur. 238. expresses himself upon this point with equal force, and greater elegance. "A confusion of terms in any science tends to confound the science itself, by destroying that precision of ideas, that distinction among its objects, which is the very groundwork of all knowledge. *Nomina si perdas, certe distinctio rerum perditur.*"

(c) See Prest. Est. 279.

designate children, and children only, could not well select a term less fitted for his purpose.

The language of the books, enforcing the necessity of such a clear expression of intent, as cannot be mistaken, in order to controul the words "heirs of the body," is strong and uniform. In Poole *v.* Poole (*d*) it is laid down, that to controul these words, the intent must appear so plainly that no one can misunderstand it; and even those judges who have shewn, by their decisions at least, the most marked disinclination to countenance the rigid rules of law, have, in effect, admitted that in construing these words to mean children, we reject as well their legal, as their ordinary and natural import; (*e*) and that such a construction can only be warranted by a clear indication of intention. (*f*) But here the power, so far from warranting such construction, seems to put a negative upon it.

The argument attempted to be founded on the power, against the acceptation of the words "heirs of the body" in their proper sense, may be thus stated:—that the words of purchase in the power must govern the construction of words of limitation used in the gift in default of appointment; and that where a testator, in framing a power, defines the objects by a word of purchase, clearly,

(*d*) 3 Bos. and Pull. 627.

(*e*) *Per* Lord Ellenborough, Doe *v.* Jesson, 5 Maule and Selw. 95.

(*f*) *Per* Bailey, J. *ib.*

descriptive of the first generation only, and then, proceeding to dispose of the estate in default of appointment, employs words of limitation, having a settled import, which embraces the whole line of descendants, he must be taken to intend the same objects in both cases, and his own gift must be measured by the extent of the power which he has confided to another. But thus to cut down the words "heirs of the body," upon no other ground, than that they occur in a limitation, which follows a power of appointment, extending to children only, is, to offer them gratuitious violence; to reject the fixed signification of words, without any of the *indicia* commonly required to controul it. Where a testator, in two distinct limitations, different in their nature, the one a power, and the other a gift, has used different terms, capable, according to the rules of law, of carrying the estate to different classes of objects, the one class comprehending the other, in different modes,—what rule, or principle of construction, requires us to expound the greater term by the less, and to construe these limitations as pointing at the same objects, and the same mode?

Upon principle, therefore, it seems clear, that the argument built upon the power cannot be sustained. The authorities are no less conclusive.

In the case of Doe dem. Cole *v.* Goldsmith, (*i*)

(*i*) 2 Marsh, 517. 7 Taunt. 209.

which arose upon a devise of all the testator's messuages, lands, tenements, and hereditaments, to F. G. for his life, and from and immediately after his decease unto the heirs of his body lawfully to be begotten, in such shares, manner, and form, as he should by will or deed appoint; and in default of *such* heir of his body, lawfully to be begotten, then, from, and immediately after his decease, the testator gave and devised his *said* real *estates*, (*k*) hereditaments, and premises aforesaid, unto J. G. his heirs and assigns for ever. Gibbs, C. J. stated the argument against an estate tail in F.G. to be, that the words "heirs of the body" meant *children* of F. G.; for when the testator devises to the heirs of the body of F. G. in such shares as the tenant for life shall appoint, that is a gift to persons who must be *in esse* when F. G. was to appoint to them; that the default of such issue must therefore be a default of *such persons* who can only be the children, and that therefore the testator, by this expression, manifestly means to refer to the same persons, who were to take as tenants in common under the appointment; not to the heirs of the body of the first taker in the ordinary legal sense. But the Court held that F. G. took an estate tail by implication, on the ground that the testator never could have intended that the estate should go over until the heirs of F. G. were

(*k*) As to the effect of similar words in passing a fee, see Roe d. Allport *v.* Bacon, 4 Maul. & Selw. 366.

extinguished. In this case, it will be observed, that the words "heirs of the body" in the clause, on which the implication was founded, were apparently connected, by express reference, with the same words occurring as words of purchase in the power. The correct mode of viewing this case, however, may perhaps be, to consider the words "unto the heirs of his body in such shares, &c." as including a power, and a gift; (*l*) "heirs of the body" being *quoad* the power, words of purchase, and *quoad* the gift, words of limitation; and the word *such* as referring to them in their latter sense. (*m*) But on whichever ground the decision is placed, it is a strong authority against the argument founded on the power.

So in Jesson *v.* Wright, (*n*) a case which will be considered at large hereafter, the same ground was taken: but the argument, though fortified by circumstances of a stronger nature than occurred

(*l*) Brown *v.* Higgs, 4 Ves. 708. 5 Ves. 495. 8 Ves. 561. Morgan d. Surman *v.* Surman, 1 Taunt. 289. And see Crossling *v.* Crossling, 2 Cox 396.

(*m*) It may deserve consideration whether, upon the authority of the cases referred to, the Court would not have been as fully warranted in construing the devise to be equivalent to a gift, in default of appointment, to the children of F. G. in common in fee, as in some of the cases (*infra* Sect. III.) where that construction has been adopted. If so, the case is an authority against that construction.

(*n*) 2 Bligh 1. *Infra*, Sect. V.

in Doe *v.* Goldsmith, was not allowed to prevail against the rule.

The principle of the following decisions appears to apply, with considerable force, to this species of inferential construction.

A testator devised to the second and other sons of T. N., successively in tail male, and in default of such issue, to the daughters of T. N. (without words of limitation) and for default of such issue, to the right heirs of T. N. The daughters were held to take life estates. Lord Mansfield said, "The Court has no power to strike out the word *such;*—and if they did, what are they to supply it with—tail general or tail male?" (*o*) Yet there is as much colour of reason for implying words of limitation to the daughters, as for inferring from the language of the power a gift to the *children* of H. T. Willcox.

And in a case (*p*) before Lord Eldon, where a testator gave the residue of his estate, both real and personal, to trustees, and the survivors, and survivor of them, and to the heirs, executors, and assigns of the longest liver of them, in trust to keep the same together till the first day of January 1804, and till that period to dispose of the profits for the

(*o*) Denne d. Briddon, *v.* Page, 11 East. 603. *n.*
(*p*) Georges *v.* Georges, MSS.

benefit of his daughter, and grand-daughters, as therein directed; and then, as to the final disposition of the rest and residue of his estate, so devised and bequeathed in trust to be kept together until the first day of January 1804, he declared it to be his will and desire, that all such parts thereof as consisted of real estates, slaves, mules, and other stock and plantation implements and utensils, should be upon further trust, that his said trustees, and the survivors, &c. should, immediately after the arrival of the period aforementioned, divide the same into three equal parts or shares, to and for the separate use and benefit of his daughter F. L., his grand-daughter R. H., and his grand-daughter S. P.; whom he thereby willed and ordained to be his residuary devisees and legatees in manner and form following, (that was to say), &c. The testator then proceeded to declare the trusts of the respective thirds in favour of his daughter, and grand-daughters, respectively, and their respective children; and this declaration was followed by a proviso, directing that if *one* of his three residuary devisees should die before the period should arrive for making the division and allotment, without issue, or leaving issue, and such issue should die before that period, then the division and allotment should be made between the survivors of his said residuary devisees aforenamed, agreeable to the same directions, and subject to the same terms, limitations, and restrictions, as were thereinbefore expressed and declared, and that in the same man-

ner, as if all three of his said residuary devisees and legatees were then alive. And if *two* of them should depart this life before the arrival of such period, without issue then living as aforesaid; then he declared it to be his further will and desire, that the *whole* should be in trust, and to and for the use, of the *survivor*, or her issue living at the period aforesaid. F.L. and S.P. died before the first of January 1804, without issue then living: but R.H. was living at that period. The question was, whether the will was to be read as if the qualifying words "agreeable to the same directions, and subject to the same terms, limitations, &c." which occurred after the gift to the two surviving, had also been inserted after the gift to the one surviving. It was contended, that necessary implication does not mean only what arises from force of language, or plain logical conclusion; but that in a moral sense, and not in a grammatical sense, it is where there exists so strong a probability of intent, that it would be irrational to draw a contrary inference. But Lord Eldon held, upon great consideration, that the words of the will did not raise a necessary inference that the gift of the whole to the one surviving, was intended to be subject to the same limitations to which the share that survivor would have taken, on a division between the three or the two, would, by the express words of the will, have been subject, and that such a construction would be mainly founded on conjecture.

So in Smith *v.* Death, (*q*) upon exceptions to the Master's report in favour of the title, which was derived under a devise to C. B. for life, with remainder to the use of such child and children of C. B. *and him surviving*, who should be brought up and educated as a member of the established church, and be a constant frequenter thereof, in such parts as C. B. should by deed or will appoint; and in default of appointment, to the first son of C. B. who should be brought up, &c. and the heirs of the body of such first son; it was objected, by the purchaser's counsel, that the power of appointment being limited to surviving children at the death of the father, the immediate gift to children, in default of appointment, was to be construed with the same limitation. But the Vice-Chancellor held, that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or *rational* inference.

The clear result of the authorities, therefore, is decidedly adverse to the inference, by which it is endeavoured to restrain the limitation to the objects of the power. We proceed to consider the effect of the superadded words of limitation.

II. That words of limitation in fee simple, engrafted upon the words "heirs of the body" (in the plural) do not convert the latter into words

(*q*) 5 Mad. 371.

of purchase had ceased to be matter of speculation long before the late case of Measure *v.* Gee. (n) As such supperadded words do not indicate a course of descent inconsistent with that pointed out by the words "heirs of the body," they are considered as capable of harmonizing with the legal meaning of the latter words; and, indeed, they seem to be nothing more than an expression of that capacity of enlargement into an estate descendible to heirs general, which is tacitly included in the former words. It does not, therefore, appear necessary to use so harsh a term as the rejection of the superadded words: they are treated as involved, or, if such an expression be allowable, as absorbed, in the words "heirs of the body." We do not reject them as repugnant to the words "heirs of the body:" but merely deny them a distinct and independent operation.

The insufficiency of these superadded words is fully established by decision.

In the case of Morris *v.* Le Gay, (s) there was a

(r) 5 Barn. & Ald. 910.

(s) 2 Burr. 1102. (cited). "Morris *v.* Le Gay came before the Privy Council by appeal from Barbadoes in 1730. There the devise was, &c. (as above). The counsel who argued that case were Mr. Fazakerly and Sir Dudley Ryder; and the Lords of the Council, assisted by Lord C. J. Raymond, and Lord C. J. Eyre, determined that it was an estate tail in the first taker." *Per* Lord Kenyon, 5 T. R. 304.

devise to L. for her life, then to the heirs of her body and their heirs; and if she died without such *heir* of her body, then over. L. was held to take an estate tail, notwithstanding the superadded words, aided by the words of reference in the singular number.

And so in Goodright *v.* Pullyn, (*t*) which was a devise of lands to N. L. for his life, and after his decease unto the heirs male of the body of the said N. L., lawfully to be begotten, and *his* heirs for ever; but if the said N. L. should happen to die without such heirs male, then over; it was determined to be an estate tail in N. L. Fortescue, J. thought *his*, in grammatical construction, would properly refer to N. L. But they all held that, "the operation of plain and clear words (*i. e.* the words 'heirs male of the body' of N. L.) and a settled rule of law, should not be defeated, or broke into, by uncertain or doubtful words, which they took the last at least to be."

It will be seen that the wording of the devise in the above case threw some difficulties in the way of the construction adopted by the Court: but those difficulties vanished in the instant that the judges resolved to found themselves on the broad and stable principle, that the settled import of technical language is not to be sacrificed to ex-

(*t*) 2 Lord Raym. 1437.

pressions of an ambiguous, or less determinate character; a principle, the disregard of which has introduced into the more modern decisions, upon devises of this nature, much of the perplexity unhappily to be found there, and, in fact, threatened to yield them up a prey to the morbid cravings of conjectural sagacity.

In the case of Wright *v.* Pearson, (*u*) before Northington, (then Lord Keeper) the devise was to T. R. for his life, remainder to trustees to support contingent remainders; remainder to the use of the heirs male of the body of T. R. lawfully to be begotten, and their heirs; with a proviso charging the estate with 100*l.* each to his two nieces, if T. R. should die without leaving any issue male of his body living at his death; and for default of *such* issue male of T. R. the premises were de-

(*u*) 1 Amb. 358. But more accurately 1 Eden. 119. "Some cases were determined by Lord Northington. The first (meaning Wright *v.* Pearson) was a case which was determined against this general doctrine 'that the intention should control the legal sense of the words:' but this case not being satisfactory, an appeal was prepared to be carried to the House of Lords. But no opinion which the successful parties took encouraged them to answer such appeal, and therefore they chose to drop it." *Per* Willes, J. in Perrin *v.* Blake, 1 Coll. Jur. 303. Yet in the same case Aston, J. arguing in support of the same opinion with Willes said, that "Wright *v.* Pearson turned upon the intent." *Ibid.* 306. As to superadded words engrafted upon words of limitation, whether in the singular or plural, he said they were *immaterial.* *Ibid.*

vised to testator's five grandchildren, or such of them as should be living at the time of the failure of issue of T. R., with another proviso, that in case T. R. should refuse or neglect to qualify himself to be ordained a clergyman, the premises so limited to him for life, and his issue male as aforesaid, should remain to such of the five grandchildren as should be then living. The Lord Keeper decided, that T. R. took an estate tail; and observed, "it is true the words 'their heirs and assigns' (x) will on this construction in *a great measure* be rendered ineffectual; and though it is a rule never to reject words in a will, if they can stand, yet I must do it in this case, to support the testator's intent; because if I give them their *full* effect, I destroy the substantial provisions in the will, of which the testator had a thorough understanding." We shall presently have occasion to advert to this case for another purpose.

And in King *v.* Burchell, (y) Lord Northington observed, "There is not a case in the books where 'issue' or 'heirs' have been used in the plural

(x) It does not appear from the state of the case, that the words "and assigns" were tacked to the superadded words of limitation. In another passage of the judgment (1 Eden 128.) Lord Northington is made to cumulate words of perpetuity on these superadded words:—"But this case is said to be manifestly distinguished by the superadded words 'their heirs and assigns *for ever*.'"

(y) 1 Eden 424.

number, and words of limitation added, that they have been taken as words of purchase: but on the contrary 'heir' in the singular number has, and 'issue' may from the context, be construed words of limitation." This admission is entitled to the greater weight, inasmuch as it will appear, in the progress of these observations, that Lord Northington was not imbued with a taste for the relics of feudal policy.

The late determination in Measure *v.* Gee, (z) is a strong authority to the same effect. This was a case sent by the Vice-Chancellor for the opinion of the Court of King's Bench, upon a devise to A. T. for her life, and after her decease to J. T. for his life; and after the determination of that estate by forfeiture or otherwise, then to trustees and their heirs during the life of J. T. upon trust to preserve the contingent remainders thereinafter limited: but to permit J. T. during his life, to receive the rents, and after the decease of J. T. then unto the heirs of the body of J. T. lawfully to be begotten, his, her, and their heirs and assigns for ever. But in case it shall happen that there should be a failure of issue of the body of J. T. lawfully to be begotten, then there was a devise over to the daughters of A. T. The Court certified that J. T. took an estate tail. Abbott, C. J. observed (according to the report) that in all the cases cited

(z) 5 Barn. and Ald. 910. (1822.)

by the counsel (*a*) against the estate tail, a *manifest* intent appeared on the face of the will that the *children* should take different interests from estates tail." If by this it be meant, that there was a manifest intent, that children of the first devisee should take as purchasers, we shall presently see, that in one, at least, of those cases, the House of Lords was not only unable to discover such an intent, but was forcibly struck by the manifestation of a contrary intent. When the Court thus professes to see more than meets the eye in former decisions, we are rather apt to distrust its judgment in the case immediately under its consideration, which may have been viewed through the same deceptive medium.

It may be safely admitted, that in cases where it can be ascertained that the words "heirs of the body" are used as descriptive of persons, to take in another character than that of heir,—of individuals to take by purchase,—the superadded words of limitation may afford ground of argument against the construction of an estate tail in the first taker, founded upon what is termed a general intent in favour of his issue: but before the superadded words can come into operation at all, a clear intent must be collected from other expressions, to

(*a*) Gretton *v.* Haward, 2 Marsh. 9. 6 Taunt. 94. Doe *v.* Goff, 11 East. 668. Merest *v.* James, 1 Brod. & Bing. 484. *Infra*, Sect. IV.

strip the words "heirs of the body" of their appropriate character; for while they retain that character, the superadded words are absolutely neutralized; and to set up the latter against the legal effect of the former, is entirely to reverse the order in which we are bound, by the settled rules of exposition, to consider the language of the will.

The power, and the supperadded words, afford, therefore no evidence of intention in favour of children, or other objects as purchasers, upon which a Court can act; and the words "heirs of the body" are left at liberty to exert their full force up to the point at which the limitation is *complete*.

III. The effect of the clause introducing the devise over, as pointing at an indefinite failure of issue or not, is deemed material to be considered, and is indeed the main stay of the construction, in that class of cases, (*a*) where the previous devise describes the objects under a term, which is either properly and primarily a term of purchase, as "children," or is in its nature indifferent and indeterminate as 'issue." (*b*) But where there is

(*a*) *Infra*, Sect. VII.

(*b*) "The word 'issue' is one of the most vexed words in the books; sometimes it is a *nomen singulare*,—sometimes plural; sometimes a word of limitation, sometimes of purchase." *Per*

a clear precedent gift to heirs of the body, a term which *proprio vigore* embraces issue indefinitely; it is wholly unnecessary to seek assistance from the subsequent words; nor can it be endured that words introductory of a further disposition, by reference to such previous devise, because they happen to describe the period of its determination in terms inconsistent with its nature, or short of its actual extent, shall defeat the settled operation of that devise. The Courts from an abundant anxiety to fortify their judgments, and, perhaps, some latent disinclination to oppress an old rule of law with the whole burthen of the decision, have in many of the modern cases used the generality of the clause introducing the devise over as confirmatory of an estate tail, where the previous *gift* has been unambiguous and perfect in itself: but it cannot be collected from the former authorities, that the construction stood in

Clive, J. in Roe d. Dodson *v.* Grew, 2 Wils. 324. "'Issue' is an ambiguous term: it may mean, and frequently does mean, children only; it may mean all descendants." *Per* Sir William Grant, in Earl of Orford *v.* Churchill, 3 Ves. & Beam. 67. "The word 'issue' is not so appropriated a word of limitation as the word 'heirs.'" Fear. C. R. 120. "The word 'issue' is a word of less determinate meaning than the words 'heirs of the body,' and in wills depends for its construction more on the intention of the testator, than on the strict rules of law." Prest. Est. 379. "In some cases a distinction has been taken between the effect of the words 'heirs male' and 'issue male:' but according to my note of Roe *v.* Grew, Lord C. J. Wilmot thought there was none." *Per* Buller, J. 5 T. R. 305.

need of such aid, and certainly no case had gone the length of reducing such a gift within the limits of a subsequent restrictive clause, not equally explicit, and unequivocal.

This is strongly exemplified in the case of Wright *v.* Pearson, (*c*) which is fully commented upon by Mr. Fearne. (*d*) In that case a gift, with superadded words of limitation, was followed by a proviso, and a devise over, the one contemplating a failure of the issue male at the death of the first taker, and the other in the lifetime of persons *in esse;* and the "default of *such* issue male of T. R." in grammatical construction referred to the dying without issue male living at the death of T. R.: but the Court thought it would be "absurd" so to construe the will, and in effect new-modelled the arrangement of the clauses, in order to let in a more rational construction.

In Atkins *v.* Atkins, (*e*) lands were devised to S., and to the heirs of his body, and *after his decease* to B., the eldest son of S., and the heirs of his body. This was adjudged an estate tail in S.

So, in Doe d. Cock *v.* Cooper, (*f*) where a testator devised a messuage and lands to R. C. for the term *only* of his life, and after his decease,

(*c*) *Supra* 58.
(*d*) Fearn. C. R. 93.
(*e*) Cro. Eliz. 248.
(*f*) 1 East. 229.

unto the lawful *issue* of the said R. C. as tenants in common: but in case the said R. C. should die without leaving lawful issue, then *after his decease* to E. H. in fee; it was held an estate tail in R. C. Lord Kenyon said, that the *implication* from the subsequent words "in default of his leaving issue," made it an estate tail. (*g*) He thought that to raise cross remainders by implication between more than two, without any thing further than what appeared there, would be directly contrary to former authorities; and as this consideration may be thought to have influenced the construction, and as the rule against implying cross remainders between more than two has since been relaxed, if not in effect reduced to a dead letter, this case cannot now, perhaps, be deemed quite so satisfactory an authority as when it was first decided; yet, if it be considered that in the clause introducing the devise over, on which the implied estate tail was founded, the words "after the decease" were aided by the word "leaving," and that this clause prevailed in a case where the restrictive word "only"

(*g*) It seems difficult to discover the principle which suggested this resort to implication. The gift to the lawful issue seems to be at least as strong to create an estate tail, as any implication from subsequent words, contemplating a dying without leaving issue; and if it be said that the words "as tenants in common" restrained the *gift* to children of the first taker, where shall we find the principle which sanctions two contrarient interpretations of the same words ("lawful issue") occurring in such close association?

was applied to the estate for life, and where the Court had not to struggle with any stubbornness in the word "issue," (an ambiguous word, capable of yielding to any construction in favour of the intent,) it should seem to be at least as strong a case as one, in which the word "immediately" is found without any of those circumstances, and with others of an opposite nature.

In Doe d. Cole *v.* Goldsmith, (*h*) however, already cited, the word "immediately" did occur; the devise over being introduced by the words "and in default of such *heir* of his body lawfully to be begotten, then, from and *immediately* after his (the tenant for life's) decease;" yet those words were not considered as opposing any obstacle to the construction of an estate tail. There are two cases, which, on a cursory inspection, may be thought to favour the restrictive operation of the words in question, and which were in fact urged against the estate tail in H. T. Willcox, and not improbably influenced the decision.

One of these is Robinson *v.* Grey, (*i*) (a case directed by the Court of Chancery,) where a testator devised certain messuages to her three daughters, E. R., A. G., and M. R., and to the survivor of them for their respective lives, share and share alike, and from and immediately after the decease

(*h*) *Supra* 49, *et seq.* (*i*) 9 East. 1.

of all of them, to all and every the child and children, as well sons as daughters, of the said E. R., A. G., and M. R., who should be living at the death of the survivor of them, as tenants in common, (no words of limitation, nor the word *estate*,) but if all her said daughters should die without leaving any issue, then *immediately* from and after the decease of the survivor of her said daughters, in trust for the testator's grandson, W. R., (the heir at law of testatrix,) his heirs and assigns for ever. And testatrix devised the residue of her real estate to her said three daughters, share and share alike. The judges certified (and, as it should seem, mainly upon the ground that the testatrix intended to exclude the *heir* altogether, if the contingency on which the estate was devised to him should not happen) that such of the children of the daughters as should be living at the death of the survivor would take estates in fee as tenants in common. It does not appear how the Court would have decided if the ultimate devisee had been a stranger, (and the circumstance of his being the heir does not seem to form a very solid ground of distinction,) but assuming that in such case the children would have taken life estates, the words "from and immediately after," &c. being deemed irreconcileable with the notion of an indefinite failure of issue of the daughters, the case would only prove, that where there is a devise to A. for life, with remainder to his children

living at his death, as tenants in common, (without words capable of carrying the fee to them) and in case A. shall die without leaving issue, then from and immediately after his decease over, the latter clause does not amount to such an implication of a general intent as will get the better of an express particular intent, and enlarge the estate for life into an estate tail by construction: but it would fall far short of proving, that where the devise is to A. for life, and then to the heirs of his body, the words in question are of force to cut down the estate tail expressly given by the preceding words.

The other case is that of Doe d. King *v.* Frost, (*k*) which was a devise to the testator's son, W. F., and his heirs for ever; and if W. F. should *have* no children, child, or issue, the devised estate was *on* the decease of W. F. to become the property of the heir at law, subject to such legacies as W. F. might leave by will to any of the younger branches of the family. W. F. was held to take a fee with an executory devise over. Bailey, J. said, "If the Court see by the whole frame of the will, that the estate is to continue in the first devisee, so long as he has any lineal descendants, it will follow that the gift to him is of an estate tail: but if the will gives it to him in fee, there may be then an executory devise over, on the happening of a particular event. Here the will

(*k*) 3 Barn. and Ald. 546.

gave the estates to W. F. and his heirs for ever; and if he had no children, child, or issue, the estate was on his decease to become the property of the heir at law. It does not seem to me that this contemplates a devise over on an indefinite failure of issue, but only on the failure of issue at the time of W. F.'s death; and the subsequent part of the clause confirms me in this opinion, for if the will had given an estate tail, with the reversion in fee to W. F., it would have been wholly unnecessary to have given him the specific power of charging the estate with legacies." This case, (assuming it to be rightly decided,) does not apply; for the devise was in fee simple; and in order to attribute some meaning to the words "and if," &c. it was absolutely necessary that they should operate to abridge or determine the devise; but if they had been appended to the devise of a life estate, the words would have received a different construction. Besides "on" was rather stronger than "immediately after;" and the other words were of an equivocal character. As to the reliance placed on the supposed confirmatory circumstance of the power, it was against former dicta and decisions, and quite at variance with Seale *v.* Barter. (*l*)

Indeed the words "from and immediately after," when considered in connection with the context, do not seem to create any real difficulty; for the

(*l*) 2 Bos. and Pull. 495.

clause, "And in case the said H. T. Willcox shall die without issue, then from and immediately after (*such*) his decease," imports nothing more than "from and immediately after his decease and failure of issue," or, in other words, "from and immediately after the determination of the preceding estate;" and a less violent exposition of the words than Lord Northington applied to the devise in Wright *v.* Pearson, (*m*) would clearly give this meaning to the clause. The word "immediately" must be understood, not in the sense of immediately in point of time, with reference to the single event of the death of the first taker; but, immediately in point of limitation, with reference to the previous devise; *i. e.* without any mediate estate or interest. In fact, there is no such magic in this word as can overturn a previous disposition conceived in clear technical language; though it may sometimes serve to conjure up the semblance of an objection, where nothing more tangible presents itself.

IV. There remains to be considered the circumstance of the bequest of 500*l.* to the testator's daughter Elizabeth, "in case his son should live and *have children, as aforesaid.*" This bequest does not necessarily suppose, that if his son shall have children born, the daughter's chance of succession will be entirely at an end: but it supposes

(*m*) *Supra* 58.

that the limitations to her will then be in the power of the son, as he may appoint to his children, who would take the fee. If any construction be put upon the words "as aforesaid," they must be held to refer to the children mentioned before as objects of the power, there being no other previous mention of children; and if they be rejected, the clause standing as a bequest to the daughter, in the abstract unconnected event of the son's having children, cannot furnish any ground of argument. In Wright *v.* Pearson, (*n*) there was a bequest of legacies to nieces, if the first taker should die, without leaving any issue male living at his death: but this circumstance was not allowed to militate against the construction of an estate tail in the first taker.

Thus it appears that on every one of the circumstances capable of being adduced against the estate tail in H. T. Willcox, there existed authorities so strong, that it should seem impossible for any mind, though not thoroughly imbued with veneration for "that remnant of ancient strictness," the rule in Shelley's case, to withstand their direct and conclusive force. Confining our investigations to the words of the will, and to the adjudications already cited as decisive of the construction, the case must appear on the strictest scrutiny, to be absolutely destitute of any point of difference

(*n*) *Supra* 58.

whereon to hang a "rational and considerable doubt." But as rational and considerable doubts did exist; as minds competent to meet and overcome all ordinary obstacles, felt the pressure of difficulties not apparent on the face of the will, or the authorities already produced; the reader will naturally be led to suspect, either that those authorities have not been fairly stated, or that other authorities of a different complexion have been passed over in politic silence.

But discussions of this nature can propose to themselves no other legitimate object than that of bringing the subject fairly under review; and, if possible, developing the truth. It must not, therefore, be disguised that after Mr. Fearne, by the vigorous efforts of a mind peculiarly fitted for abstruse investigations, seconded by a force of diction which gave to the dry deduction of recondite principles all the energy of original conception, had systematized and illustrated the learning of the rule in Shelley's case, which continued to be studied and upheld as part of the law of the land, in spite of that zeal for intention which imputed to such maxims (*a*) the narrowness and darkness of the

(*a*) "A maxim is a *sure* foundation, or ground of art, &c." Co. Lit. 11. *a*. "By an ancient maxim of law, although the estate be limited to the ancestor expressly for life, and after his death to his heirs, the fee shall vest in the ancestor.—The reason of this maxim has long ceased: but having become a rule of property, it is adhered to in all cases *literally* within it;

times that begat them, (*b*) and to their advocates habits and pursuits uncongenial to the reception of the free spirit of a liberal age; (*c*) after his genius had called forth from the mass of crude materials that lay scattered before him, a fabric at once elegant and solid, and evinced the practicability of recommending the rude institutes of our ancestors to

but where there are circumstances which take the case out of the *letter* of this rule, it is departed from." *Per* Lord Mansfield, 2 Burr. 1106. It may be thought that the same authority which could reduce the maxim to a senseless form of words would be competent to abolish it altogether. In a subsequent part of the same judgment we find his Lordship contending against a strict adherence to the mere letter of law. *Infra, n.* (*c*)

(*b*) "The maxim grew with feudal policy, and the reasons of it are now antiquated. I shall ever discountenance, as much as I can, any thing which savours of ancient strictness and policy." *Per* Willes, J. in Perrin *v.* Blake, 1 Coll. Jur. 297, 299. "It is an old rule of feudal policy, the reason of which is long since antiquated, and therefore it must not be extended one jot." *Ibid.* 305.

(*c*) "I do not doubt but there are, and have been always, lawyers of a different bent of genius, and different course of education, who have chosen to adhere to the strict letter of law; and *they* will say that Shelley's case is an uncontrollable authority; and *they* will make a difference between trusts, and legal estates, to the harrassing of a suitor; for great are the doubts frequently which is, or is not a trust. And if courts of law will adhere to the mere *letter* of law, the great men who preside in Chancery will ever devise new ways to keep out of the lines of law, and tamper with equity." *Per* Lord Mansfield in Perrin *v.* Blake, 1 Coll. Jur. 321. His Lordship said that "he thought upon those points at that instant just as he did thirty years ago." *Ibid.* 318.

the taste of a more fastidious generation; after he had thus founded what appeared to be a durable monument to his fame, so that when the author of the Essay on Contingent Remainders was mentioned, every body "knew who was meant:" (*d*) the lurking fondness for principles more flexible and docile once more insinuated itself into the Courts; and in a few years made such rapid progress in sapping the foundations of the rule, that in one of the late cases (*e*) the able counsel for the plaintiff affirmed with truth that the law as laid down by Mr. Fearne no longer obtained.

The mischief may, perhaps, be traced to a source anterior to the labours of Mr. Fearne,—to the case of Doe d. Long *v.* Laming (*f*) which was evidently decided under the influence of a strong aversion from the rules of law. That case, though affecting to proceed mainly on the circumstance of its being a devise of gavelkind lands, held out an indirect warrant at least, for construing the words "heirs of the body," when coupled with superadded words of limitation in fee, or words importing a tenancy in common, or other expressions inconsistent with a taking by descent from the

(*d*) "It was said that the conveyancers had rested upon Coulson *v.* Coulson, and I know who was meant." *Per* Lord Mansfield, Perrin *v.* Blake, 1 Coll. Jur. 321.

(*e*) Measure *v.* Gee, 5 Barn. & Ald. 910. *Supra* 60.

(*f*) 2 Burr. 1100.

ancestor, to be merely a substituted term for *children;* a construction which has prevailed through a line of cases (*g*) that will come under review in the course of these observations.

But these decisions have produced only a temporary obscuration. It will sometimes happen in the moral as in the natural world, that at the close of a luminous day, mists and exhalations will arise only to be dissipated by the sunshine of the morrow. Happily for the repose and security of titles derived under wills, and of those on whom the responsibility of such titles may devolve, the determination of the House of Lords in Jesson *v.* Wright, (*h*) reversing the judgment of the Court below, has checked the career of innovation. As that determination may be said to form the commencement of a new epoch in the history of the rule, it presents a point from which a comprehensive review of the nature and application of the rule with reference to devises, might, it is conceived, be advantageously taken: but to disencumber the rule of all the extraneous matter under which it labours, and reproduce it as a well defined and conspicuous landmark, would be an arduous, and in some respects,

(*g*) Doe *v.* Ironmonger, 3 East. 533. Doe *v.* Goff, 11 East. 668. Gretton *v.* Haward, 2 Marsh. 9. 6 Taunt. 94. Crump *v.* Norwood, 7 Taunt. 362. 2 Marsh. 161. Doe *v.* Jesson, 5 Maule & Sel. 95. reversed Dom. Proc. 2 Bligh 1.

(*h*) 2 Bligh 1.

an invidious task. Till some abler pen shall render this service to the profession, an attempt to sketch, however faintly and imperfectly, a few of the probable subjects of such a review, may not be wholly without its use. It is proposed, therefore, to consider:—

I. The degree of evidence which, previously to the decisions above alluded to, had been adjudged necessary to convert the words "heirs of the body" into words of special designation descriptive of individuals; and thereby to repel one of the two circumstances which must concur in order to found the application of the rule.

II. The tendency of the above decisions, and the doctrines there propounded, to unsettle principles which had long been regarded as immoveable landmarks; and not only to render the application of the rule in question to devises precarious, but to throw open the construction of wills generally to the discretion of the courts.

III. The effect of the reversal by the House of Lords of the decision in Doe *v.* Jesson, in restoring the authority of those principles, and establishing the rule on a broader foundation than it stood even prior to the above decisions.

IV. The speculative opinions of eminent lawyers upon the nature and authority of the rule, as re-

gards its subserviency to intention, particularly with reference to the effect of an express superadded declaration that the heirs of the body shall take by purchase, where a precedent freehold, capable of uniting with the limitation to the heirs, is by the same conveyance limited to the ancestor.

V. The nature and tendency of the doctrine of general and particular intention as applied to express devises to the heirs of the body of the first taker.

SECTION III.

Of the Evidence requisite to explain "Heirs of the body" *according to the authorities anterior to Doe d. Hallen* v. *Ironmonger.*

THE most strenuous supporters of the rule have never attempted to contend that "heirs of the body" in a will cannot be controlled by subsequent words, expressive of a clear intention to apply that term to a particular person or persons; nor that the circumstance of their being preceded by a life estate in the ancestor, capable of uniting with them under the rule in Shelley's case, renders them in any degree less susceptible of explanation; though it has been the fashion to assail the rule and its advocates, as imposing a rigid perverse interpretation upon the word "heirs;" whereas, in point of fact, they leave the meaning of both limitations to be fixed by the ordinary rules of interpretation, while their opponents unable to make "heirs of the body" yield to their construction of first and other sons, &c. consistently with *these*

latter rules, (*a*) impute the stubbornness of the words not to their own strength, but to the rule in Shelley's case.

The cases in which, previously to the decisions proposed for consideration in the next section, the legal and natural sense of the words, "heirs of the body" (in the plural) had been held to be explained away, bear no sort of proportion to those in which that sense had prevailed against circumstances of an opposite tendency.

The first case to which we shall advert is that of Lisle *v.* Gray (*b*) upon a deed, where one covenanted to stand seised to the use of himself for life, remainder to the use of E. his son for life, remainder to the first son of E. in tail male, with several successive remainders to the second, third, and fourth sons of E, in tail male; and *so* severally and respectively to all and *every* of the heirs males of the body of E., and the heirs males of the bodies of such heirs males, according to seniority of birth; and for default of such issue, over. There was a proviso for raising portions out of the lands for the daughters of E., if E. should die without issue male. It was held that E. had only an

(*a*) *Infra*, Sect. VI.

(*b*) 2 Lev. 233. Sir Thomas Raym. 278. Sir T. Jones 114. 1 P. Wms. 90. Pollex. 582. And see Walker *v.* Snow, Palm. 359.

estate for life, by the manifest intent of the conveyance, the word "so" being translated *eodem modo*. (c)

This word "so" identified the limitation which it introduced, with the preceding limitations, to the four first sons; and was tantamount to a limitation to the fifth and every other son. The decision rests upon this connecting monosyllable, as explanatory of what objects were meant by "the heirs males of the body of E.," rather than upon the effect of the engrafted words of limitation, ("and the heirs males of the bodies of such heirs males") or the proviso for raising portions for the daughters; for those circumstances alone would not have warranted the construction adopted. This has also been considered as in effect a limitation to the heir in the singular, with words of limitation superadded; (d) and consequently as governed by Archer's case (e) and other cases of that class. But this mode of considering the case does not appear to support the construction put upon the words "all and every of the heirs males of the body of E." which were understood in the sense of "every other of the *sons* of the body

(c) "The word 'so' is intended onwards, and *not* in like manner." *Per* North, C. J. Sir T. Ray. 302.

(d) Wilm. 401.

(e) 1 Co. R. 66.

of E." The construction can only be sustained by treating the words "heirs males" as a substituted term for "sons."

In the next case, Lawe *v.* Davies, (*m*) the devise was to B. J. and his heirs lawfully to be begotten; that is to say, to the first, second, third, and every other son and sons successively, lawfully to be begotten, of the body of the said B., and the heirs of the body of such first, second, third, and every other son and sons, successively, lawfully issuing, as they should be in seniority of age, and priority of birth; the eldest always, and the heirs of his body, to be preferred before the youngest and the heirs of his body. And in default of such issue, then to his right heirs for ever. The Court held that the whole will must be taken together, and one part explained by the other; and that the intent was most manifest that the devisor, in all the devises of the lands in question, designed to give B. only an estate for life, and not an intail; and that the *videlicet* and the other clauses were not contrary, but explanatory of what heirs of B. J. the devisor meant.

Here the words "his heirs lawfully to be begotten" were merely inserted as a short introductory head to apprise the reader of the general tenor of the subsequent limitations, to which we are im-

(*m*) 2 Ld. Raym. 1561. (1729)

mediately and expressly referred for the really effective and operative disposition of the estate. Besides, the words "his heirs lawfully to be begotten" are not so positive to give an estate tail as "heirs of the body." They might, in the absence of other evidence of intention, have been considered open to different constructions; (n) and it would be against all rules of construction to control the operative and effective part of a clause, by ambiguous words occurring in the introductory part of it. (o)

It is observable that this case did not fall within the terms of the rule in Shelley's case, as no distinct estate of freehold was limited to B. J.; not that the intrinsic meaning of the word "heirs" can be affected by that consideration, which, however, seems to have had a degree of influence in some cases, to which we shall advert under the second head of inquiry.

Mr. J. Blackstone observes, (p) that in Lawe v. Davies, when the testator had first devised in a loose unguarded manner to his son B., and his heirs lawfully to be begotten, he immediately recollects himself, and adds, by way of explanation, "that is to say," &c. With deference to such high authority,

(n) Nanfan v. Legh, 7 Taunt. 86.
(o) *Per* Sir William Grant, 3 Ves. & Bea. 67.
(p) Harg. Tracts. 506.

it is submitted that this is not the true view of the case. The words "that is to say," &c. were not an after-thought, or a retracting of the preceding words; but were the primary and principal idea in the mind of the testator, to which the first words were merely introductory. It is one continuous and entire disposition; and this constitutes the distinction between such cases, and those in which the subsequent words are merely secondary and referential.

Lord Kenyon adverts to this case in Goodtitle d. Sweet *v.* Herring (*q*) in these terms: "In former times, indeed, greater strictness was attributed to the words 'heirs of the body.' The estate which was the subject of dispute in Lawe *v.* Davies came to a gentleman who was not satisfied with the decision; and whose doubts were founded upon an *old* opinion of Lord Holt's, that the words 'heirs of the body' were so positive to give an estate tail to the first taker, that they could not be gotten rid of by subsequent words. That opinion I have seen: but it was certainly too strait-laced a construction, and nobody has ever since doubted that the case of Lawe *v.* Davies was rightly decided." (*r*) The assertion that the words "heirs of the body" were interpreted with less strictness than formerly might be true, as applied to the extra-judicial opinions of his Lordship, and some of his brothers: but was clearly not at that period borne

(*q*) 1 East. 164. *infra.* (*r*) 2 Burr. 1100. *infra.*

out by any decision upon those words, except Doe d. Long *v.* Laming. (*s*) This *dictum* must be classed with the assumption of Lord Mansfield in Taylor d. Atkyns *v.* Horde (*t*) that feoffments had lost their ancient virtue. Lord Holt's opinion was probably to this effect;—that an express gift to one and the heirs of his body had so fixed a meaning in law, that subsequent expressions which did not so clearly manifest an intention to use "heirs of the body" in another definite sense as to exclude all doubt, would not control those words. Supposing Lord Holt's opinion to have gone no further, it is surely of some value; always bating its antiquity, an objection, which, when time once begins to run against an opinion, must be ever gaining strength, but to which we will hope that some of Lord Kenyon's opinions, upon points of this nature, may not live to be exposed. In Lawe *v.* Davies such an intention was sufficiently

(*s*) "There is no doubt but that the words 'heirs of the body' may be controlled by subsequent words, that was so held in Lawe *v.* Davies, and a variety of other cases; and yet it is worth remembering *as a matter of curiosity*, that Lord Holt and Lord Sommers thought that they could not be so restrained by any subsequent words as to carry less than an estate tail." *Per* Lord Kenyon in Denn *v.* Puckey, 5 T. R. 306. This "variety" of cases was not to be found in the Books in Lord Kenyon's time. It is improbable that Lord Holt and Lord Sommers gave an unqualified opinion that *no* subsequent expression of intention could explain "heirs of the body" so as to make them words of designation.

(*t*) 1 Burr. 60.

apparent; yet it should seem that the parties did not sit down quietly under the decision.

The case of Doe d. Long v. Laming, (u) which stands next in order, arose upon a devise of an undivided fourth of gavelkind lands to testator's niece A. C. and the heirs of her body, lawfully begotten, or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common. It does not appear that there was any devise over. A. C. died in the testator's lifetime. The Court held that it was clearly the testator's intention that the heirs of A. C.'s body should not take till after her death; and that as the devise to *her* had no words of limitation added to it, it was a devise to her for her life, and that heirs of the body were synonimous with children; who were intended to take the inheritance in fee simple as tenants in common. Even assuming heirs of the body to mean children in this devise, the construction adopted by the Court does not appear to have been borne out by authority: but this point is foreign to the present enquiry.

Lord Mansfield said the devise could not take effect at all, but must be absolutely void, unless the heirs took as purchasers; that the term "heirs" in the plural, in the case of gavelkind lands, an-

(u) 2 Burr. 1100. (1760)

swered to the term "heir" in the singular in the common case of lands not being gavelkind; for the word "heir" in the singular would not serve for gavelkind lands, it *must* be "heirs" in the plural; that the testator mentioned females, not only expressly, and particularly, but even prior to males; and that it was clear that the testator did not mean that the lands should go in a course of descent in gavelkind.

These appear to have been the grounds chiefly relied on, though the judgment seems anxious to provide a reserve of arguments drawn from other devises in the will to be brought up if the front line should be broken. (*s*)

(*s*) The will, according to the report in Burr., contained, amongst other devises, a devise of another undivided fourth of the same lands to testator's niece-in-law G. R. widow of his late nephew E. R. deceased, and to the heirs of *her* body lawfully begotten as well males as females, and to their heirs and assigns for ever, to be divided equally share and share alike as tenants in common, and not as joint tenants. Lord Mansfield is made to observe, that the testator's disposition of one of the proportions shewed his intention as to the rest, *viz.* the devise to the widow of E. R., which could receive no other construction but that those heirs must take as purchasers. He could not mean that his nephew's widow should take the estate tail in that whole one-fourth; therefore the necessary construction of that devise was a strong argument of his intention as to the rest. 2 Burr. 1111. But it should seem that this is a mistake of the reporter, and that the devise was to the heirs of *his* G. R.'s body. 3 T. R. 145. But, taken either way, no argument can

In the report of Goodtitle d. Sweet *v.* Herring, (*t*) Lord Kenyon is stated to have said that Lawe *v.* Davies, if it wanted confirmation, had been fortified by the subsequent decision in Doe d. Long *v.* Laming, of which his Lordship read a note of Mr. Filmer's, taken, as he said, more accurately than that of Sir James Burrough. The Court there clearly thought, (continued his Lordship) that the subsequent words "as well females as males," shewed that the testator meant the words "heirs of the body, &c." to be words of description of the persons whom he intended should *next* take, not words of limitation.

Mr. J. Blackstone observes upon this case, (*u*) that it was a devise of gavelkind lands, and that since gavelkind lands cannot descend to heirs female, as well as males, (as is expressly declared by the statute *De Prer. Reg.* 17 Ed. 2. c. 16.) nor can heirs as such be tenants in common, but coparceners; it was clear that by the words "*heirs of* the body," (thus explained by the words, "female as well as male," and to take as tenants in common) the devisor could only mean to describe the *children* of A. C. But this conclusion does not seem to flow from the premises.

Here, again, the devise to A. C. and the heirs of her body was unbroken: but this circumstance he founded upon it against the estate tail in A. C. in the fourth devise to her and the heirs of *her* body.

(*t*) *Infra.* (*u*) Harg. Tracts 506.

is no farther material, than as it was adverse to the supposition that the heirs were intended to take otherwise than through the ancestor. It certainly did not preclude the Court from collecting an intention from other words, that A. C. was meant to be tenant for life only, with a distinct remainder to the "heirs of the body:" but as the rule would have immediately stepped in, this would have been a mere work of supererogation. It was therefore necessary to get rid of the word "heirs," by legal means if possible, but at all events to strike it out of the will. Lord Mansfield thought it of consequence to clear his way by shewing that the rule in Shelley's case was a narrow rule of feudal origin, and that the reason of it had long ceased. (*v*) But his Lordship was under an erroneous impression, if he supposed that the rule opposed any obstacle to the free interpretation of the word "heirs;" *it* had fixed no meaning to that word.

It is submitted that the circumstances which appear to have induced the construction were not satisfactory. I. The devise would have been ab-

(*v*) "The reason of the rule may now have ceased with the abolition of feudal tenures, for it certainly was introduced to preserve the duties to the lord of the fee; and I think if this rule had never been departed from, it would have been better for the public in general, though it might have proved prejudicial to some individuals, for it renders property very precarious, that judges should *excruciate* themselves to find out the testator's meaning and intention; and though this has been done in some particular instances, I should not be for carrying it one step further."—*Per* Wilmot, Lord Com. Wilm. 400.

solutely void. This means either that it would have been a lapsed devise, A. C. having died in the testator's lifetime; or that it would have been void for uncertainty, or incongruity; but the first consideration was wholly inadmissible, for we have the authority of Lord Mansfield himself against construing a devise with reference to subsequent events; (x) and as to the second, the objects of the gift being ascertained beyond a doubt, the repugnant or incongruous words, attempted to be applied to them, must have been rejected.

II. The lands were gavelkind. It is clear from the use which Lord Kenyon made of the case, that he did not attribute any weight to this circumstance, which has, however, been generally treated as the distinguishing feature of the case. Is not this circumstance, in truth, rather against the construction adopted by the Court? The expressions, importing division, seem less irreconcileable with the idea of a partible descent, than with a descent at common law, where the eldest son succeeds to the entire inheritance. As gavelkind lands may devolve upon females by representation, together with males, the words "as well females as males," might have been satisfied in that manner. But then it has been decided (y) that a limitation of land, not gavelkind, to one for life, remainder to the next heir male, and the heirs male of such heir

(x) White v. Warner, 11 East, 551 n. 6 T. R. 518.
(y) Archer's case, 1 Co. 66.

male, operates as a description of the individual heir, and does not vest the inheritance in the ancestor; and it is urged that "heirs" in the plural, with superadded words of limitation, is the same with reference to gavelkind lands, as "heir" in the singular with reference to other lands; for "heir" in the singular would not do for gavelkind land; it *must* be "heirs" in the plural. But (laying the words "next," "first," &c. out of the case) does not this argument prove too much? It proves that the nature of a descent in gavelkind, which equally requires the word "heirs" in the plural, whether the whole line of succession, or the first generation of heirs as individuals, be in contemplation, excludes, so far as regards the customary heirs, one of the *indicia* afforded by the course of a common law descent. Can the authorities, which, in order that the limitation may operate to give an estate by purchase, require the word "heir" in the singular, with engrafted words of limitation, warrant the same construction in a case where the first of these circumstances is wanting; and the words which supply its place are properly descriptive of a succession of heirs? Nor if the argument could be sustained, would it assist the construction; for "heirs of the body," operating as words of purchase, would have given the estate to all the sons, (z) not all the children

(z) But it should be observed, that a limitation of gavelkind to heirs of the body by purchase, as to A. for life, remainder to the heirs of the body of B., gives the estate to the heir at common law, unless attended with explanatory words; and it seems

male and female, unless "heirs of the body male and female" include females not being heirs; and, if so, why not all the issue indiscriminately of A. C. *in esse* at her death? If we must *substitute* another word for "heirs," to satisfy the words "male and female,"—why confine the gift to children, and thereby exclude altogether the issue of a child dying in the testator's lifetime?

It is observable that the word "next" occurred in Archer's case. But it should seem that "heir" in the singular, unrestrained by "next," "first," &c. though it will be *nomen collectivum* in the absence of superadded words of limitation, is turned into a word of particular designation by the effect of superadded words. (*a*) In Wright *v.* Pearson, (*b*) however, Lord Northington said that there were several cases of words of limitation superadded, which turned words of limitation into words of purchase, all founded on the principle in Archer's case (for he did not rely on the word "heir" being in the singular number) in all which cases there had been some words like "next," &c. (*c*)

clear that a limitation of gavelkind land to the "heir" in the singular, with superadded words of limitation, would operate as a description of the common law heir. 1 Co. R. 101. Co. Lit. 10. *a.* Rob. Gavel. 117.

(*a*) Fearn. Cont. R. 140.

(*b*) 1 Eden. 128.

(*c*) But see Cheek *v.* Day, Fearn. Cont. R. 102. Trollop *v.* Trollop, Rob. Gav. 96. When it is considered that a devise to A. for life, remainder to his *next* heir male, and for default of such heir male, over, is an estate tail in A. (Burley's case, 1 Vent. 230.)

which have been descriptive of an individual, and made them properly words of purchase.

3. The mention of females particularly, and even prior to males. This circumstance is strongly indicative of an intention that the heirs of the body should take by descent. The testator knew that the consequence of a descent in gavelkind would be, that all the sons would take, in exclusion of the daughters; and he wished to obviate that consequence, by expressly admitting the daughters to an equal participation with the sons: but still in a course of descent; he was labouring to correct that invidious preference of males. He very naturally mentioned females first, and placed the emphasis on them; for they were at that moment the predominant idea in his mind: perhaps he thought them the more worthy. To prove that under the gift to heirs of the body, males and females could not inherit together by descent, is not to prove that the testator intended to vest the inheritance by purchase in the children of the first taker. Would any person, learned or unlearned, reading this devise, say with confidence that the testator employed this peculiar form of words "heirs of the body as well females as males," not preceded by any restriction of the ancestor's estate, merely to describe children, destined to take

it must appear, I apprehend, that the words "next," "first," &c. do not constitute the true ground of decision, which is to be found in the concurrence of the two circumstances, viz.—"heir" in the singular, and superadded words.

the fee by purchase, in remainder expectant on a life estate in the first devisee? Can it be maintained that the testator did not suppose himself to be entailing this estate on the issue male and female, and fixing it in the family of his daughter? The words "as well males as females" tacked to "heirs of the body" in a devise of gavelkind lands, cannot well be deemed stronger than the words "sons and daughters" so coupled in a devise of lands not gavelkind; yet in Pearson *v.* Vickers, (*d*) where the devise was to one and the heirs of his body "as well sons as daughters," the devisee was held to take an estate tail.

4. The superadded words "their heirs and assigns for ever." The cases referred to in the discussion of Willcox *v.* Bellaers prove the insufficiency of these words to convert the words "heirs of the body" into words of purchase; much less to impress them with a signification foreign to the sense they naturally bear.

5. The words assuming to create a tenancy in common. These words should have been rejected for repugnancy. The determination of the House of Lords in Jesson *v.* Wright (*e*) is now a decisive authority for the rejection of such words; that case afforded much stronger arguments against the rejection of similar words.

The words "heirs of the body" were therefore

(*d*) 5 East. 548. 2 Smith 160. (*e*) 2 Bligh 1.

wholly unexplained; such heirs were the objects, and the only objects, of the testator's bounty. The law had annexed a precise meaning to those words: but no one could affirm with certainty in what precise sense the testator had used the subsequent words, "as well females," &c.; and, therefore, (not to insist that the presumption was strongly against his having used those words to limit the gift to issue of the first degree,) the real question was, whether words of definite legal meaning should yield to words of uncertain construction; and the Court thought it most consonant to the ends of justice, to decide that question in the affirmative. It is singular that a case apparently presenting so many vulnerable points should not have invited more discussion. (*f*)

(*f*) Mr. Fearne, after stating this case, observes that the words "heirs of the body" did not stand independent and unqualified: but were corrected and explained very expressly, by the words which followed, and were coupled with them. The words "as well females as males" annexed to the words "heirs of the body," were incompatible with, and expressly broke the descent, because gavelkind lands cannot descend in this manner; and the devise expressly created a tenancy in common, which was impossible by descent, as that must have been in coparcenary; and besides there were words of limitation in fee grafted on the words "heirs of the body," (a circumstance, however, which Mr. Fearne has himself shewn to be of no weight, Fearne, C. R. 141.) which could not have been satisfied by an estate tail in the ancestor. Fearn. C. R. 107. All these circumstances only prove that the testator had several incongruous ideas in his mind. The case has never been regarded by the profession as a sound determination; and it must be recollected that as Mr.

If to these cases we add the case of Burchett *v.* Durfant, (*g*) and that put by Anderson, (*arguendo*) in Shelley's case, (*h*) of a limitation to A. for life, remainder to his heirs and their heirs female, of which case Lord Thurlow observed, in Jones *v.* Morgan, (*i*) that "heirs" *must* be a description of the persons, in order to let in the limitation to the heirs female, and that it was the *only* case to the contrary of the doctrine, that where the limitation is of an estate of freehold to a man, and afterwards to his heirs, &c., (whether general or special) so as to give it to the heirs as a denomination or class, the heirs shall be in by descent, and not by purchase; we shall have a brief, but complete, list of cases, in which, previously to the period when Mr. Fearne wrote, "heirs" or "heirs of the body" in the plural, connected with an estate of freehold in the ancestor, had been allowed to operate as a designation of individuals; and, I believe, no case can be found in which the absence of such estate of freehold had been made a ground, or been deemed to afford an additional reason, for construing "heirs," or

Fearne's argument was directed to prove that there was no decision prior to Perrin *v.* Blake, in which heirs of the body, under circumstances similar to those which there occurred, had been held to operate as words of purchase, his object was accomplished by shewing that Doe *v.* Laming had other ingredients.

(*g*) *Infra*, 100, 104. (*h*) 1 Co. R. 95 *b.*

(*i*) 1 Bro. C. C. 221.

"heirs of the body," to mean sons, children, or other objects than those whom the law intends by a limitation in these words.

In Doe d. Candler v. Smith, (j) the testator devised all his messuages, lands, &c. (subject to the payment along with his personal estate of all his debts, legacies, and funeral expenses,) unto his daughter, M. A., and the heirs of her body, lawfully to be begotten, for ever, as tenants in common, and not as joint tenants: but in case his said daughter should happen to die before twenty-one, or without leaving issue on her body, lawfully begotten, then he gave and devised all those his said freehold messuages, &c. to R. A., his heirs and assigns for ever. M. A. attained twenty-one. It was held that M. A. took an estate tail; not, however, on the true ground, namely, the express gift to the heirs of the body, and the rejection of the inconsistent words; but because, as Lord Kenyon observed, it was a rule of construction in cases of *this kind*, settled by a variety of decisions, but particularly by Robinson v. Robinson, (k) that where the testator appeared to have a general intention, and also a secondary intention, and they clashed, the latter must give way to the former. His Lordship distinguished Doe v. Laming by the superadded words of limitation in that case. He admitted that the testator intended that M. A.

(j) 7 T. R. 531. (1798.)

(k) 1 Burr. 38. 3 Bro. P. C. 180. *infra*, Sect. VII.

should only take an estate for her *life*, and that her *children* should take as purchasers: but then he also intended that all the progeny of those *children* should take, before any interest should vest in his more remote relations; the latter intention could not be carried into effect, unless M. A. took an estate tail.

Here Lord Kenyon is represented as stating the particular intent collected from the words of gift to be that M. A. should be tenant for life, with remainder to her children as purchasers, on one of the grounds, as it should seem, relied upon in Doe *v.* Laming, *viz.* that a tenancy in common was inconsistent with a descent to the heirs. Why his Lordship should have taken such pains to prove such an intent, when he was about to deny it effect the next instant, or how the want of superadded words of limitation prevented that intent from taking effect, it is not easy to discover. In Doe *v.* Laming, there was no devise over; this constitutes the principal difference between the cases. From the words introducing the devise over, Lord Kenyon collected a general intent sufficient to absorb the particular intent. But without this clause would M. A. have been held to take an estate tail? Lord Kenyon's reasoning goes to prove that she would not. That reasoning was otherwise superfluous. If, therefore, the will had stopped at the word "joint tenants," his Lordship must, I apprehend, consistently with the principles laid down in

the judgment, have held that M. A. took an estate for life, with remainder to his children as tenants in common; and this too in a case where the estate of the first taker was not restricted by express words, where there were no superadded words of limitation, where the lands were not gavelkind, and where there was no allusion to individuals, as sons and daughters, children, &c. Doe v. Laming did not go this length; nor would Doe v. Jesson, (*l*) if it had stood as an authority, have warranted such an alarming latitude of interpretation; a latitude which the wise jealousy of our laws does not think fit to extend to any court of judicature whatever. (*m*) It would probably startle a mind accustomed to reason upon ordinary principles, to learn that the devise in the first of the following columns imports precisely the same particular intention as the devise in the second; and that, having such import, it must receive the construction of an estate tail in A. to effectuate the general in-

(*l*) 5 Maul. and Sel. 95.

(*m*) As my conclusions are sometimes at variance with those of a writer, whose authority upon points of this nature stands high with the Profession, it may be fit to subjoin, from time to time, his views of the case discussed in the Text, as a caution to the Reader against yielding too ready an assent to mine.

"This case (Doe v. Smith,) turned partly on the general intention, and partly on the absence of words of superadded limitation, to mark a line of distinction. This case is to be contrasted with Doe d. Davy v. Burnsall, 6 T. R. 305 Prest. Est. 374.

"It may be remarked that mere words of perpetuity or re-

The Devise in Doe v. Smith.	The same Devise as interpreted by Lord Kenyon.	The Devise in Robinson v. Hicks, (held an estate tail in fee taken)
To A. and the heirs of her body, lawfully begotten, for ever, as tenants in common, and not as joint tenants. And if A. shall die before twenty-one, or without leaving issue on her body begotten, over.	To A. for her life, and after her decease, to her children for ever, [i. e. in fee simple, Bro. Ab. Dev. pl. 33. Co. Litt. 9. b.] as tenants in common, and not as joint tenants. And if A. shall die without leaving issue of her body, over.	To L. H. for life, and no longer, taking testator's name; and after his decease, to such son as he should have lawfully to be begotten, taking testator's name; and for default of such issue, over.

The learned editor of Gilbert's Law of Uses and Trusts, after stating the case of Doe v. Smith, makes the following observations upon it: (n)—"This is, indeed, a strong case; the gulation, added to a devise to a man and his heirs of his body lawfully begotten, will not turn the words descriptive of the heirs into words of purchase. Thus, a devise was to A., and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint tenants; and in case she should happen to die before twenty-one, or without leaving issue of her body lawfully begotten, then to another person; and it was held, the parent took an estate tail. This case [*no doubt*] is by modern decisions become questionable. To support this last case, the words *for ever* were rendered of no particular import; and the words of modification or regulation of the tenancy were disregarded, and the limitation over was considered as a remainder vested or contingent; and the words, without leaving issue, as referable to an indefinite failure of issue." *Ib.* 377.

It is presumed that the case here alluded to must be that of Doe v. Smith.

(n) Sugd. Gilb. Us. 23, n. 10.

words 'as tenants in common,' and not as joint tenants,' are so forcible, and so materially vary the case from a devise to the heirs (general or special) where they are adjudged to take by descent, (see Doe *v.* Applin, 4 T. R. 82. 1 Bos. and Pull. 221. 8 T. R. 7. *n.* 4 Bro. C. C. 545.) that it required a very general intent to authorize the Court to strike these words out of the will. Lord Kenyon's reason for so doing was, that there were no words of limitation added to the estate given to the children; and certainly there were no *express* technical words: but the devise was to them '*for ever*,' which words were sufficient to give a fee, Co. Litt. 9 *b.*; and in this case the word 'heirs' appears *ex vi termini* to have carried a fee. To this effect is the case of Burchett *v.* Durdant, 2 Lev. 232. (adjudged by the name of James *v.* Richardson,) where a devise to the heirs male of A. then living, and to such other heirs male or female as he should thereafter happen to have of his body, was held to operate as a *descriptio personæ*; and, consequently, the heir took by purchase. Then the question was, what estate the heir took; and it was resolved that he took a *fee*, for by heirs is included all the heirs of the heirs; and the judgment was affirmed first in the Exchequer, and afterwards in the House of Lords. Upon the authority of this case it may probably be thought that the children of M. A. took in fee as tenants in common, in which case the progeny of the children would take, and Lord Kenyon's objection be removed.

Perhaps the true construction of the devise was, to M. A. for life, remainder to her children, as tenants in common in fee, provided, that if she died under twenty-one, *and* without issue, then to M. A. in fee, so that the devise was for life, with a contingency with a double aspect, as in Loddington v. Kime, and that line of cases. It is clear that or meant *and*. See Fairfield v. Morgan, printed cases, Dom. Proc. July 11, 1805. 2 New Rep. 38. Denn v. Kemys, 9 East. 366. Eastman v. Baker, 1 Taunt. 174."

The Reader should be apprised that this annotation was written long before the determination of the House of Lords in Jesson v. Wright had restored the true principle of decision; a result which the learned author of the note by his elaborate argument in that case was himself mainly instrumental in producing.

There is no writer, to whose opinion upon any point of law I should be more disposed to defer, if a doubt remained in my own mind: but the acknowledged rules of law, and principles of construction, seem to place the effect of the devise in question beyond all doubt. Those rules and principles imperatively require us to strike out the repugnant and inconsistent words, (o) "as tenants in common, and not as joint tenants;" and to al-

(o) 2 Bligh 36. *Infra*, Sect. V.

low the remaining words to operate according to their natural import. On this ground, and, as it appears to me, on this ground alone, the decision may be supported. M. A. was rightly held to take an estate tail: but the *reasons* assigned by the Court will not stand the test of an instant's examination, because they assume that in the case of a devise to A. for life, remainder to the children of A., as tenants in common, and not as joint tenants, and if A. shall die before twenty-one, or without leaving issue, (for this is Lord Kenyon's version of the will,) the latter words "and if," &c. authorise the Court entirely to expunge both the particular limitations, for life, and in remainder, (and whether the limitation to the children would carry the fee, or not, is, I think, in this point of view, immaterial,) and *to substitute an estate tail in the first taker;* or in other words to recast the whole devise. (*p*) The construction suggested in the Note appears to be equally inadmissible, inasmuch as it first cuts down the estate of M. A. to a tenancy for life; next cuts down "heirs of the body" to a mere designation of her immediate children; and, lastly, changes "or" into "and;" and after all this violence done to the words, we cannot look upon the new-modelled devise with the consolation of even a probable conjecture that we have directed the testator's bounty into the intended channels. Un-

(*p*) See Sect. VII. where this doctrine of general intention is more fully considered.

doubtedly the word "or" may be construed "and," and *vice versâ*, in furtherance of the intention: (q) but we must not first speculate upon the meaning of the devise, and then accommodate these little parts of speech to our own hypothetical interpretation. If in the case under discussion we either admit the *principle* on which Lord Kenyon rested his construction, or adopt the construction suggested by the learned author of the Note, it will be difficult to say at what point exposition ends, and conjecture begins.

(q) In Brownsword *v.* Edwards, 2 Ves. 249., where the testator devised to two trustees and their heirs, to receive the rents until B. should attain twenty-one; and if B. should attain twenty-one, *or* have issue, then to B., and the heirs of his body, but if B. should happen to die before twenty-one, *and* without issue, then over; B. attained twenty-one, and died without issue: Lord Hardwicke said, "In the case of a devise to one, and his heirs, and if he should die before twenty-one, *or* without issue, then over, the Court has said, it was not the intent to disinherit the issue; and, therefore, *or* should be construed *and*: but if the first limitation had been in *tail*, there would be no occasion to resort to that, but the Court would have made the same construction that I do now, *viz.* if he die without issue before twenty-one, then over, by way of *executory devise* [q.]; if he die without issue after twenty-one, when the estate had vested in him, it would go by way of remainder, because he had made his original devise capable of a proper remainder, in which case the Court will always construe it a remainder. An estate tail is capable of a remainder, and it is natural to expect a remainder after it." See Soulle *v.* Gerrard, Cro. Eliz. 525. Doe *v.* Jessop, 12 East. 228.

The words of perpetuity would clearly be sufficient to carry the fee; but it should seem that the twofold construction of the words "heirs of the body" suggested in the Note, is not supported either by principle or authority. The argument which converts them into words of special designation, descriptive of the immediate children only of the first taker, must necessarily divest them *in toto* of all their energies as words of inheritance, reducing them to a mere substituted term for "children." The very foundation of that interpretation must be laid in the absolute exclusion of every idea attached to those words as words of limitation. They cannot, (unaided by superadded words) act simultaneously in the double capacity of describing persons not required to sustain the character of heir, and of limiting the inheritance to those persons by virtue of their efficacy as words properly descriptive of that character; and we should hardly be warranted in adopting a construction which compels the words to throw off the character that properly belongs to them for one purpose, and to reassume it the next instant for another purpose. Nor does the case referred to (Burchett v. Durdant,) appear to sanction the proposed construction. There the devise was to A., and his heirs during the life of B., upon trust to permit B. during his life to receive the profits; (r)

(r) B. was held to take only an equitable interest; "and this of itself would have prevented the words from operating as words

and after the decease of B., then to the heirs male of the body of B. now living, and to such other heirs male, or female, as he thereafter should happen to have of his body. The words "heirs male of the body of B. now living" were held to operate as a description of the person of C., the heir apparent of B.; and it was held that C. took an estate tail: the Court however did not rely entirely upon the effect of those words, but said that the subsequent words "and to such other heirs male or female as B. thereafter should happen to have of his body" would, at all events, make an estate tail in C., who survived B., and was heir of his body. (s) Besides, in that case C. filled the character of heir apparent, (t) and answered to the strict letter of the description, but did not satisfy the plural "heirs." If the words "heirs of the body" in the case of Doe v. Smith could operate doubly to describe the children, and give them the inheritance, it should seem to be more consonant to their natural function, that they should be held to give the children estates tail, than estates in fee simple. The same line of argument

of limitation, because, to come within the rule in Shelley's case, the estates must be both legal or both equitable. But the case was wrongly decided in this respect; for the devise was to A. to *permit* B. to receive the profits which certainly vested the legal estate in B." Sugd. Gilb. 25. n. (3.)

(s) See 2 Bligh 26. note by the reporter, where all the references to the different reports of this case are collected.

(t) See Sir T. Ray. 31B.

appears to have been pursued in Doe v. Lesson; (v) but the Court held that children, taking by purchase under the description of "heirs of the body" took only life estates.

The principle of Lisle v. Gray, and Lowe v. Davies, was confirmed, and somewhat extended, by the division in Goodtitle d. Sweet v. Herring (x) where a testator devised certain manors, messuages, &c. in Devon, Cornwall, &c. to M. D. for her life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; and from and after her decease, then to the heirs male of the body of the said M. D. to be begotten, severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age, and priority of birth, the elder of *such* sons and the heirs male of his body lawfully issuing being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies, and for want of such issue, then to all and every the daughter and daughters of the body of the said M. D. to be begotten, to be equally divided amongst them, if more than one, share and share alike as tenants in common, and of the several and respective heirs of the body and bodies

(v) *Infra*, Sect. IV. and V.

(x) 1 East, 264. (1801.) Affirmed in the House of Lords, printed cases, 1801. See Mandeville v. Lacker, *infra* Sect. IV. *n.*

of such daughter and daughters; and in default of such issue, then over.

Lord Kenyon relied principally on Lawe v. Davies, fortified, as he said, by *Doe* v. *Laming*; and he observed that the same principle was established by *Bagshaw* v. *Spencer*, (y) a case, of which the authority had been so shaken in Mr. Fearne's time that he conceived it could not govern except, perhaps, in cases the same *in specie et terminis*, but which at this day would not be allowed to govern any case. This reliance on two cases of such extremely questionable authority was rather unfortunate. His Lordship said he well

(y) 1 Coll. Jur. 378. This case must be considered as overruled. The *principle* on which Lord Hardwicke founded his judgment is clearly exploded; and as a decision upon the mere *words* it cannot be applied to other cases. It maintained for some time a degree of authority, and was constantly appealed to by the opponents of the rule. In Sayer v. Masterman, Wilm. 386. upon a devise of testator's *estates* or farms at, &c. to E. S. during his life, with power to make a jointure, and after his decease, to such child or children as should lawfully be begotten by him, the males to be preferred before the females; and to preserve contingent remainders during the life of E. S. he gave the said *estates and* farms to D. R.; and after the decease of E. S. and on failure of issue as aforesaid, he gave the said estates and farms to G. S. and the heirs of his body, the males having preference as aforesaid, and succeeding according to their births; and to preserve the contingent remainders during the life of G. S. he gave the *same* to the said D. R., and on failure of issue of the said G. S., he gave the said estates and farms &c.; it was held that G. S. took an estate tail: but the Court

remembered Jones *v.* Morgan, (z) and observed that there no words of limitation were superadded to the devise to the heirs male, which had always been holden to be of great weight in cases of this sort: but here again his Lordship appears to have been in error. In Jones *v.* Morgan the devise was to W. for life, without impeachment of waste, and after his decease, to the heirs male of the body of W. severally, respectively, and in remainder the one after the other, as they and every of them should be in seniority of age, and priority of birth, remainder over. Powers of leasing, jointuring, and portioning, were given to W. Lord Thurlow was of opinion that W. took an estate tail; and there is no reason to think that superadded words of limitation would have made any difference in his opinion. He thought the words "severally, respectively, and in remainder," &c. immaterial. It is clearly settled that if the words "severally," &c.

thought it material to be made out that the inheritance did not vest in D. R.; for if it did, it would have been the case of Bagshaw *v.* Spencer. The word "estate" was held to be descriptive of the lands only. It cannot be doubted that at this day the only difference produced by holding the fee to vest in the trustee or not, would be, that in the one case J. S. would have a legal, and in the other an equitable estate tail. Smythe, Baron, distinguished between the devises to E. S. and G. S.; observing, that in the devise to E. S. there were very strong words of implication to carry an estate tail; but that in the devise to G. S. there were strong technical words. See Sect. VII.

(z) 1 Bro. C. C. 218.

had been omitted, and superadded words tacked to "heirs male," W. would have been tenant in tail. Lord Kenyon supposes Lord Thurlow to have thought that the words "severally," &c. unattended with words of limitation, made no difference whatever; but that so attended, they gave a totally different effect to the devise. Lord Thurlow's language entirely negatives the idea of his having relied upon the superadded words.

The devise in the case of Goodtitle *v.* Herring differed from that in Lawe *v.* Davies, inasmuch as there the words of limitation were introductory only, and the explanatory words were of the substance of the gift; while in the case under consideration "heirs male of the body" are the operative words of gift; and the explanation is afforded only by the subsequent incidental mention of sons in referring to the "heirs male," and by inference from the limitation to the daughters. It is clear that the words "severally, successively, and in remainder one after the other as they and every of them should be in seniority of age, and priority of birth," would have been insufficient to convert the limitation to the heirs male into remainders to the first and other sons successively in tail; and that if the will had proceeded "the elder of such heirs male" &c., M. D. would have taken an estate tail.

Lord Alvanley speaks of this case in the fol-

lowing terms (a). The case of Goodtitle v. Herring, which was cited on the part of the defendant, is certainly a case of great authority, since it went up to the House of Lords. The Court, in commenting upon that case, admitted the rule to be established, since the cases of Colson v. Colson (b) and Perrin v. Blake, (c) that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument, an estate is limited to the heirs of his body, he would take an estate tail: but they thought that the rule was not so rigid as to preclude the testator himself from explaining the words used, and Lord Kenyon cited the cases of Lawe v. Davies and Doe v. Laming, where they were so explained. The Court thought that the words 'heirs of the body' might admit of explanation, and that the words there used were sufficiently explanatory."

But in the later case of Poole v. Poole, (d) sent from the Court of Chancery, words of explanation, scarcely less strong than those in the last cited case, were rejected. The testator devised all his real estate to trustees in fee, in trust for testator's first son for his life, and to preserve contingent remainders, and after his decease for the

(a) In Poole v. Poole, *infra*.
(b) 2 Stra. 1125, 2 Atk. 246.
(c) 1 Coll. Jur. 283.
(d) 3 Bos. and P. 620, 2 Smith. 163.

several heirs male of such first son lawfully issuing, so as the elder of such sons, and the heirs male of his body, should take before the younger, and the heirs male of his body; and for want of such issue, in trust for testator's second, third, and fourth, and all and every other son and sons for their several and respective lives, and also to preserve the contingent remainders; and after their several decease, in trust for the several heirs male of their respective bodies, so as the elder of *such* sons, &c. (as before.) The will contained a subsequent devise of other property to the first and other sons successively in proper technical form.

The question for the opinion of the Court was what estate the testator's first son took. Lord Alvanley said that the words "such sons" could only apply to the heirs male of the body of the testator's first son. In the second limitation "such sons" could only refer to sons of testator. He would not give any opinion whether, if the clause ending with "and for default of such issue" had stood alone, unexplained by other parts of the will, the construction that "heirs male" in the first part of the devise meant sons, might not have been the proper construction. On this point the Court wished to avoid any determination. It appeared to him that in construing limitations of this sort, the Courts had never deviated from the general rule, which gave an estate tail to the first taker, where the de-

vise to him was followed by a limitation to the heirs of his body, except where the intent of the testator had appeared so plainly to the contrary that no one could misunderstand it. In this case, however, when the limitation upon which the difficulty arose, was connected with the other limitations, in which the testator had used the same words, clearly without intending that the heirs of the body should take by purchase, it would be strange to suppose he intended heirs in this limitation to take as purchasers. He (Lord Alvanley) took the rules respecting the construction of words in wills to be plain and well settled. Words were always to be taken in their ordinary sense, unless the testator had demonstrated an intention to put a different sense upon them. Now the words employed in the first devise were clearly, in their ordinary sense, words of limitation. Another rule in the construction of wills was, that neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition, describing the order of succession, in which the devises are to take place, nor the introduction of powers of jointuring, or of liberty to commit waste, were of themselves sufficient to vary the technical sense of the words used. But it must plainly appear that the testator did not intend to give such an estate as would pass under the words used, unless controlled by such apparent intent. "My brothers (added his Lordship) agree

with me in thinking that this rule must be *rigidly observed*."

These observations from a judge, who is known to have formed his opinions upon mature consideration, (e) and whose judgments have always commanded great respect, bear strongly against the authority of Doe *v.* Laming, and the class of cases reserved for consideration in the next section.

The rule requires a limitation of the *inheritance* to the heirs. Mr. Justice Blackstone has observed, (*f*) that common sense will tell us, that when the inheritance is not given to the heirs, they cannot be intended to take by descent. The case of Seaward *v.* Willock (*g*) is an instance of this kind. The testator devised to T. S. the estate of Holcomb Burnet, during his life: but to his trustee in his behalf should be committed the profits of the said estate until he should arrive at the age of twenty-one years; and after him, to his eldest or any other son after him during his natural life; and after them, to as many of his descendants, issue male, as should be heirs of his or their bodies, down to the tenth generation, during their natural lives. Lord Ellenborough observed, that the testator's meaning was to give estates for life only to T. S., and after him to his sons, and

(e) 8 Ves. 565.

(f) Harg. Tracts 505.

(g) 1 East, 138. 1 Smith 390. (1804.)

after them to their sons, down to the tenth generation. But this he could not do by law, inasmuch as the law would not allow of a successive limitation of estates for life to persons unborn. Could the Court then make another will for the testator, giving to his devisees different estates than those he meant to give them, because the estates he intended could not by the rules of law take effect? This, properly speaking, was not a case of particular and general intent, both of which could not be effectuated: but a case of single intent to create a succession of estates for life not warranted by law. (*h*)

The next case is Pierson *v.* Vickers, (*i*) (sent by the Master of the Rolls) where the devise was of freehold and copyhold *estates* at B. unto A. V., and to the heirs of her body, lawfully begotten,

(*h*) "In the late case of Seaward *v.* Willock, 5 East. 198., the Court of King's Bench appeared disposed not to carry this rule (the rule which sacrifices the particular to the general intent) quite so far as it had been carried by former authorities." Sugd. Gilb. Us. 23. *n.* 10. In a note to Butl. Fearn. C. R. 201. (*a*) upon the doctrine of *cypres* or approximation, established by Humberstone *v.* Humberstone, *supra*, 23., followed by other cases, but in which Lord Eldon has declared that it would be improper to go one step further, it is observed that this doctrine was rejected in the case of Seaward *v.* Willock, where the language of the will was strongly contended to afford ground for its reception. See also Hayes *v.* Foorde, 2 Black. 698.

(*i*) 5 East. 548. 2 Smith 160. (1804.)

whether sons or daughters, as tenants in common, and not as joint tenants, and in default of such issue, to M. V. and J. V., for their joint lives; with remainder to trustees to preserve during their lives, and after the decease of either of them, to the child and children of M. V. and J. V., whether sons or daughters, and their heirs and assigns for ever, as tenants in common, and not as joint tenants. The Court certified that A. V. took an estate tail. Lord Ellenborough said the cases of Doe d. Candler *v.* Smith, (*k*) and Doe d. Cock *v.* Cooper, (*l*) seemed to apply very strongly to the present. Lawrence, J. doubted whether the word "estate" could be construed to carry a fee, coupled, as it was, with words of local description.

This appears to be at least as strong a case for turning "heirs of the body" into words of particular designation, as most of those to which we shall hereafter advert. For, 1. "Heirs of the body" were immediately connected with words of purchase, "sons or daughters," which words were, in a subsequent limitation of the same estate clearly applied to the children of the first taker. 2. There were words importing a tenancy in common, (and negativing a joint tenancy) a circumstance relied upon in Doe *v.* Laming. 3. If the words "heirs of the body" had been construed "children," it is clear that the word "estates," though coupled

(*k*) *Supra*, 96. (*l*) *Supra*, 64.

with words of locality, (m) would have given them the fee, so that in effect here were also words of superadded limitation in fee, which was another ingredient in Doe v. Lanning. 4. The devise over was to take effect in default of "such" issue. (n)

But the frame of the subsequent limitations, giving particular estates, with remainders to children in proper form, may be deemed adverse to a similar construction of the gift in question. This circumstance, however, seems to be inconclusive, inasmuch as the inference to be drawn from it against affixing the same sense to "heirs of the body," &c. must be founded on the supposition that the testator was a "technical lawyer," whereas it plainly appears that he was not. If, therefore, "heirs of the body" in connection with words importing a tenancy in common, &c. *primâ facie* mean children, the subsequent devise was not sufficient to exclude that interpretation. This decision cannot easily be reconciled upon principle with some of the later cases. (o)

(m) Uthwatt v. Bryant, 2 Marsh. 30. Denn v. Hood, *ib.* 359. Randall v. Tuchin, 6 Taunt. 410.

(n) Two circumstances are material (in Pierson v. Vickers.) 1. The gift was to Ann, and the heirs of her body, by one entire and connected clause. And, 2dly, and this is more important, there were not any words of superadded limitation, so that the sons and daughters, as purchasers by that name, could have taken the inheritance. The general intention governed this decision." Prest. Est. 373.

(o) *Infra*, Sect. IV.

The principle deducible from the above determinations, (excepting Doe v. Laming, from which no principle can be extracted) appears to be, that in order to impress the words "heirs of the body" with a meaning different from their ordinary meaning, there must be explanatory expressions of the most unequivocal character, directly referable to those words, so as completely to satisfy the mind that the testator used them in a certain qualified sense, and in that sense alone.

In Lisle v. Gray, Lawe v. Davies, and Goodtitle v. Herring, the words, as explained by the *testator*, imported a succession of estates tail, adapted to the preservation of the estate in the family of the first taker, an explanation of which the words are known to be susceptible, as they are commonly used in this sense in short heads or instructions for strict settlements, and are so understood by courts of equity in marriage articles, and executory trusts. But in Doe v. Laming the same words, as explained by the *Court*, altogether repelled the idea of an intail; and vested the absolute fee simple in the children of the first taker, thereby depriving the more remote issue of the chance of succession afforded them by an estate tail in the ancestor, (a chance which is of some value in legal estimation, (*p*)) and at once laying the estate open to alienation by the ordinary modes of assurance.

(*p*) Wilm. 279, 280.

SECTION IV.

Review of Decisions since the time of Lord Kenyon, in which "Heirs of the Body" unexplained, *have been held to designate* Children.

General Remarks on these Decisions, and the Principles which they threatened to Introduce.

OF the decisions, since the time of Lord Kenyon, in which the words "heirs of the body" have been held to be restrained, one has been reversed in the House of Lords, (*a*) another has been denied by the same high authority to be law, (*b*) a third is stated to have been a surprise upon the profession, (*c*) and we shall presently see what degree of credit is really due to the rest.

In the first of these cases, Doe d. Hallen *v.* Ironmonger, (*d*) the estate of freehold limited to

(*a*) Doe *v.* Jesson, see Jesson *v.* Wright, 2 Bligh 1.
(*b*) Doe *v.* Goff, *Ibid.*
(*c*) Gretton *v.* Haward, see 1 Jac. & Walk. 566.
(*d*) 3 East. R. 533. (1803.)

the ancestor, and the remainder to the heirs, were, by reason of their different qualities, incapable of uniting. The testatrix devised to G. B., and to the heirs of his body, testatrix's real estate, to hold unto G. B. and his heirs for ever, with a proviso that if G. B. or no heir of his body, should be in Great Britain, or if living should not come into Great Britain personally to claim the estate within seven years from testatrix's death, then the executors were to receive and retain the rents for their own use for ever; and at the end of the said seven years, testatrix devised her said estates to G. H., his heirs and assigns, upon trust to receive and apply the rents for the support of S. C. and the issue of her body, lawfully begotten, or to be begotten, during the natural life of S. C.; and from and after the decease of S. C., then upon trust for the use of the heirs of the body of S. C. lawfully begotten, or to be begotten, their heirs and assigns for ever, without any respect to be had or made in regard to seniority of age, or priority of birth; and in default of such issue, then in trust for the right heirs of A.B. for ever. Lord Ellenborough said, that all S. C.'s *children* were intended to take together, "without regard to seniority of age, or priority of birth;" that must mean that *they* should take as joint-tenants; and as the father of the lessor of the plaintiff died before any severance of the joint-tenancy, his children could not take. The counsel for the plaintiff admitted that S. C. did not take an estate tail, inasmuch as the legal freehold was

executed in the trustee, and the estates could not unite; but contended that the limitation to the heirs was a legal contingent remainder to the person answering the description of heir of the body of S. C. at her death.

The clause "without any respect to be had, &c." was an attempt to foist into the succession qualities which the law will not allow of, and ought, (according to Lord Alvanley's doctrine, that "mere words of condition, describing the order of succession in which the devises are to take place, are not sufficient to vary the technical sense of the words 'heirs of the body,'") to have been disregarded; nor were the superadded words entitled to any weight.

It matters little whether we reject words, or render them nugatory by construction. The reasoning attributed to Lord Ellenborough denied all operation to the words "without any respect, &c." for if the testatrix intended children to take, they must necessarily have taken as joint-tenants, for want of words to create a tenancy in common; and whether they took as joint tenants, or tenants in common, they would have taken without regard to seniority of age, or priority of birth. The Court probably reasoned thus:—The testatrix contemplated a taking without respect to seniority, &c.; but heirs of the body cannot so take; therefore, the testatrix must have meant other objects, and most probably children. On the same

principle, if the devise had been to the children of S. C. their heirs and assigns for ever, regard being *had* to seniority of age, and priority of birth, the Court must *è converso* have construed "children" to mean "heirs of the body;" and indeed this would be the less violent construction of the two, since "children" (*e*) may act as a word of limitation in a will, without express words of explanation, although heirs of the body cannot (as we have seen (*f*)) be cut down to a mere description of individuals without the clearest evidence of intention. In fair construction, the words of the devise import succession, without regard to primogeniture, a descent contrary to the common law. If the testator contemplated children, the qualification was insensible.

The words "in default of *such* issue" passed unnoticed; though, according to the doctrine laid down by Lord Kenyon in Doe *v.* Smith, (*g*) and other cases of that class, and adopted by Lord Ellenborough on other occasions, these words manifested the testator's general intention that the devise over should not take effect till the issue of S. C. should be extinct; and which intention could only be effected by allowing the heirs of the body to take *per formam doni*. In Pierson *v.* Vickers, (*h*) where the expressions were more favorable to a

(*e*) Seale *v.* Barter, *supra*, 43. Wilde's case, 6 Co. R. 16.
(*f*) *Supra*, Sect. III. (*g*) *Supra*, 96.
(*h*) *Ibid.* 114.

restricted construction of the words "heirs of the body," Lord Ellenborough asked "How do you get rid of the words 'in default of *such* issue?'" (*i*)

If this case were to stand, it would be an authority for putting an interpretation upon the words "heirs of the body," when not preceded by a freehold in the ancestor, different from that which had obtained where the freehold was limited to him.

In a subsequent case, Doe d. Strong *v.* Goff, (*k*) certain messuages were devised to testator's daughter M. G. and to the heirs of her body, lawfully begotten, or to be begotten, as tenants in common, and not as joint tenants: but if such issue should depart this life, before he, she, or they, should respectively attain their age or ages of twenty-one years, then to J. M. his heirs and assigns for ever. And by another clause in the will, the testator devised other premises to his son J. M., and the heirs of his body, lawfully begotten, or to be begotten: but if J. M. should die without issue, or such issue should all die before he or they should attain their age of twenty-one, then and in such case, he devised the same to his said daughter M. G. and to the heirs of her body lawfully begotten, or to be begotten, such issue if more than one to take as tenants in common, and not as joint tenants. It was held that under the gift to the

(*i*) *Infra*, Sect. VII. (*k*) 11 East. 668. (1809).

heirs of the body of M. G. her children were entitled as tenants in common. Lord Ellenborough said, that the provision, that the heirs of the body should take as tenants in common, and not as joint tenants, shewed very distinctly that the testator was contemplating something very different from an estate tail; because an estate tail, if there were sons, would vest wholly in the eldest son, to the exclusion of all the rest, and upon an estate tail there would be neither joint tenancy, nor tenancy in common; and the words which followed *put it past all doubt* that the testator used the words "heirs of the body," not as words of limitation, but as equivalent to children or *issue* of her body, to give such children a distinct and independent interest. The words were, "but if such issue should depart this life before he, she, or they, should respectively attain the age of twenty-one," then he devised to his son in fee. Whom does he mean then by such issue, but the persons to whom he had before referred by the description of the heirs of his daughter's body? And when he is contemplating the possibility that he, she, or they, may depart this life before twenty-one, (*l*) to whom can he be referring but the immediate children of his daughter? In the devise to the son, of the estate given to him, the words "heirs of the body" were perhaps used in a *different sense*, at least

(*l*) Not "without issue," so that the issue of a child dying under twenty-one would be left without a provision.

there were no new words importing that they were to take as tenants in common; but it was observable, that in the limitation over to the daughter upon failure of the issue of the son, the testator again used the term "heirs of her body;" when he is *clearly* speaking of her children, and again provided that they should take as tenants in common, and not as joint tenants. It had been urged that there was a paramount intent, not indeed that any such intent was expressed, but it was assumed that the testator never could have intended that any part of the estate in question should go over to the son, so long as there was any descendant of the daughter. But how could the Court say what was the testator's intention upon a point, upon which he had expressed no intention at all? The Court had looked through the cases which had been cited; and did not feel that they should break in upon *any* of them, by holding that the children of M. G. took *estates* in common by purchase; that was *distinctly* and *unequivocally* expressed by the testator to be his intention: no contrary intention was expressed in any part of his will, nor was there any provision contained in the will inconsistent with this intention, nor from which a contrary intention could fairly be implied.

Upon the citation of this case in the House of Lords, in Jesson *v.* Wright, (*m*) it called forth an

(*m*) 2 Bligh 42.

observation from Lord Redesdale that the words "if such issue should depart this life before twenty-one," &c. were insensible if the estate were given to the children for *life*, as the estate in such case would go over whether they died before or after twenty-one. And in delivering judgment, (*n*) his Lordship observed, that Doe *v.* Goff seemed to be at variance with preceding cases; that in several cases it had been clearly established that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate tail, and that subsequent words, such as those contained in the devise in Jesson *v.* Wright, had no operation to prevent the devisee from taking an estate tail; that in Doe *v.* Goff there were no such subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over; that this seemed to his Lordship so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that he thought it peculiarly shewed that he did so mean; that it would otherwise be wholly insensible. If the objects did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one; that it seemed to indicate the testator's conception that at twenty-one the children would have the power of alienation; and that it was impossible to decide the

(*n*) 2 Bligh 58.

case then before their Lordships, without holding that Doe *v.* Goff was not law. The Lord Chancellor observed, (*o*) that Doe *v.* Goff was difficult to be reconciled with the decision they were about to pronounce, he did not say impossible: but that case was as difficult to be reconciled with other cases.

It should seem, however, that Lord Redesdale had misconceived the effect attributed by the Court below to the words providing for the death of the issue under twenty-one; at least it appears to have been contended, (*p*) that the children took in fee; and nothing can be collected from the judgment which favours the supposition that the children were considered as taking only life estates. If it had been necessary to decide the question, there can be little doubt that it would have been held (and properly held) that the children (supposing children to be the objects) took the fee: but as the plaintiff was equally entitled to recover whether the children took for life or in fee, the Court was not called upon to pronounce any opinion upon the point. (*q*)

(*o*) 2 Bligh 55.

(*p*) Robinson *v.* Grey, 9 East, 1. (*supra* 66.) Doe d. Wright *v.* Cundall, *ibid.* 400. were cited, and see Frogmorton d. Bramstone *v.* Holyday, 3 Burr. 1624. Merest *v.* James, 1 Bro. & Bing. 484, *infra*, 143. *n.* Toovey *v.* Bassett, 10 East. 460.

(*q*) "It was decided in Doe *v.* Goff, that A. was only tenant

On reference to the judgment of the Court in this case, it will be found to proceed throughout upon the *assumption* that "heirs of the body" meant children, That point being conceded, the reasoning is strong and triumphant.

The contrast between the language of the Court of King's Bench, and that of the Lords, is remarkable. We find lawyers of the greatest eminence relying upon the same expressions, as affording the most distinct and conclusive evidence of intentions wholly dissimilar; the Court below asserting that their decision would not break in upon any former adjudication, while the Court above pronounced it utterly irreconcileable with preceding authorities.

An adherence to the simple principle, that a devise in clear words shall not be affected by repugnant expressions of a less settled operation, would, it is conceived, have prevented this violent collision of opinion, which must tend to detract in some degree from the authority of the inferior Courts upon points of this description. There will always be Lawyers, whose course of study, and habits of thinking, (r) will inspire them with a strong devotion to precedent, and who will not be found wanting in ability to vindicate, or courage

for life, with remainder over to her heirs of her body, considered as children, as tenants in fee by implication, subject to a limitation over, by executory devise." Prest. Est. 375.

(r) *Supra*, 73. *n.* (c).

to maintain, those established rules, without which property would be an idle word. Decisions which, stand opposed to inveterate practice, or the current of authority, can never be forced upon the Profession. This has now been proved in so many instances, (as in the attempts made in the time of Lord Mansfield to introduce equitable notions into courts of law, to shake off the relics of the feudal system, especially the rule in Shelley's case, and in our own times to break in upon the principles that guided the application of that rule, and to disturb the settled doctrines respecting attendant terms of years,) (s) that we may hope the period is at length

(s) See Sugd. Vend. 6th edit. 389. "Lady Radnor brought bill to have the benefit of dower against Vandebendy, who purchased of Lord Bodmyn, her husband, and to set this term out of the way; and by the decree before made, Lord Jefferys inclined to give relief, and did set the term out of the way, and direct she should bring dower at law: but Lord Somers reversed that decree, and upon appeal to the House of Lords the reversal was affirmed. There was great doubt in this Court, and so in the House of Lords, and there was a great inclination in the House to reverse that decree of Lord Somers: but when the counsel came to the bar, the Lords asked whether it was usual for conveyancers to convey a term for years to attend the inheritance to prevent dower? And the counsel, with great candour, saying it was, the Lords affirmed Lord Somers's decree." *Per* Lord Hardwicke, in Swannock *v.* Lifford, Butl. Co. Litt. 208. *a. n.* 1.

Yet in a late case Doe *v.* Hilder, Sugd. Vend. 6th edit. 411. 2 Barn. and Ald. 782. where the Court was assured that it was not the practice of conveyancers to assign or notice terms on the occasion of a marriage settlement, the Court, after taking time

arrived, when the experience of so many failures will convince the most zealous of the futility of such experiments; and induce genius either to observe the narrow bounds prescribed to legal speculations, or to choose a field better suited to its ambition. It seems extraordinary that judges who rigidly maintain the technicalities of special pleading, which regulate the remedy, pronouncing them (as Lord Ellenborough was wont very justly to do) essential to the conservation of the laws of England, should not adhere with equal strictness to the rules of property, which confer the right.

The next case which occurred, Roe d. Clement *v.* Briggs, (*t*) did not render it necessary to give a decided opinion upon the effect of the words "heirs of the body" in creating an estate tail in the first taker.

It was the case of a devise of certain *burgage*

to consider of its judgment, appears to have decided upon the assumption that the practice could not have been accurately stated. The fact, however, is within the knowledge of every professional man who has had any thing to do with the preparation of a marriage settlement. One of the mischiefs of these presumptions is, that no practitioner can fix the precise period when the act must be supposed to have taken place. Hillary *v.* Waller, 12 Ves. 239. *supra* 17. is open to the same objection. Contingent remainders may be legal or equitable, and consequently destructible or not, &c. and the title, therefore, good or bad, according to the period at which the presumption of the conveyance of a legal fee is to arise.

(*t*) 16 East. 406. (1812.)

messuages, &c. to testator's son R. C. for his life, and after his decease, unto the heirs of the body of R. C. lawfully begotten, or to be begotten, equally amongst them as should be then living, share and share alike. Also it was testator's further will that in case R. C. die without issue lawfully begotten, or to be begotten, then after his decease the testator devised the said messuages, &c. unto the heirs of the body of testator's son J. C. lawfully begotten, or to be begotten, for every share and share alike. There was no custom of entailing. Lord Ellenborough said that whether this was considered in the nature of an estate tail in R. C. in order to effectuate the general intent of the testator according to the cases of Robinson *v.* Robinson, (*u*) Doe d. Cock *v.* Cooper, (*x*) Roe *v.* Grew, (*y*) and that class of cases, or whether it was considered as an estate for life in R. C., with a contingent remainder to the heirs of his body, or *children*, living at his death, in either way of considering it, the lessor of the plaintiff was barred by the recovery suffered by R. C.

The case of Doe *v.* Goff was relied upon in argument against the construction of an estate tail in R. C.; which seems to have been the true construction. A devise to A. and such heir of his

(*u*) 1 Burr. 38. *Infra*, Sect. VII.
(*x*) *Supra*, 64.
(*y*) 2 Wils. 323. *Infra*, Sect. VII.

body as shall be living at his decease, (z) or to A. for life, and after his decease to his next or first heir (a) in the singular number, is an estate tail in A., (unless attended with superadded words of limitation;) and it seems impossible to contend that a devise to heirs of the body (in the plural) living at the decease of the first taker, is restrained to the person or persons first answering the description of heir or heirs of the body. As to the substitution of children, that construction could be resorted to only with the view of satisfying the words "equally amongst them share and share alike:" in event, however, all the words, as they stood, might have been satisfied; for if R. C. had left issue only a daughter, and the child of a deceased daughter, the daughter and grandchild would have answered the description of heirs of the body then living, and would have taken as coparceners in equal moieties. There was not, therefore, a fair pretence for changing any of the words.

Sir William Grant, for whose opinion the Profession must ever entertain the highest respect, does not appear to have been disposed to sanction, by decision at least, the relaxation of ancient strictness. The case of Bennett v. The Earl of Tank-

(z) Richards v. Bergavenny, 2 Vern. 324.
(a) 8 Vin. 233.

erville, (b) decided at the Rolls, is not easily reconcilable with some of the decisions at law upon similar words. In that case plantations and lands in Virginia were devised to H. A. B. for his life, without impeachment of waste, and from and after his decease, to the heirs of his body, to take as tenants in common, and not as joint tenants; and in case of his decease, without issue of his body, to the testator's eldest son Lord O., his heirs and assigns for ever, subject to the charge of 5000*l.* to his daughter F. A. B., with interest from H. A. B.'s age of twenty-one, and in case of his death before that time, from the time he would have arrived at that age, if he had lived; the testator declaring his intention to be, that if H. A. B. should die under twenty-one, or without issue, and the said plantations, &c. should thereby go to Lord O., he should pay the said 5000*l.* and interest; and in case both his said sons should happen to die before they arrived at the respective ages of twenty-one, he devised the said plantation, &c. to his daughter F. A. B., her heirs and assigns for ever. And he directed that in case his sons should sell the said estates, then the produce should be laid out in the purchase of lands in England, and settled, and to such uses as he had thereby given the said estates in Virginia.

The case of Doe *v.* Goff was pressed in ar-

(b) 19 Ves. 170. (1811.)

gument as having a close resemblance to this case, and bearing strongly against the former decisions by Lord Kenyon. But the Master of the Rolls held that H. A. B. took an estate tail, observing that Doe v. Goff was evidently distinguishable from the former cases, and from this, and that the words introducing the devise over could not possibly mean any thing but an estate tail, and that the intention of preferring all the issue of the first taker to the remaindermen could not be effectuated in any other way than by giving an estate tail. Whether this case was in fact so evidently distinguishable from Doe v. Goff, and whether the words introducing the devise over were essential to the construction, or not, is less material since the latter case, in which there were no such words, has ceased to be law. If "heirs of the body" had been construed children, it might have been contended that the word "estates," even though used as a word of reference, (c) carried the fee, thereby obviating the objection that the children would take for life only.

Our attention is now called to a decision, Gretton v. Haward, (d) which is stated to have been a surprise upon the Profession, and which is certainly open to much observation. This was a case directed by the Master of the Rolls for the opinion

(c) *Supra*, 50. *n.* (*k*).

(d) 2 Marsh. 9. 6 Taunt. 94.

of the Court of Common Pleas, upon a devise to testator's wife A. H. of all the testator's real estates of what nature or kind soever, she first paying all his just debts and funeral expenses; and after her decease, to the heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by him (the testator), to be at her own disposal. The Judges (Gibbs, C. J., Heath, Chambre, and Dallas, J.) certified that *A. H. took an estate for life only, and that each of her six children took under the will a fee simple in remainder expectant upon the mother's life estate, in one undivided sixth part of the said premises, as tenants in common with the other five children.* This certificate was confirmed by the Master of the Rolls. (e)

On the citation in argument of Doe v. Smith, (f) Doe v. Cooper, (g) and Pierson v. Vickers, (h) followed by some observations on Doe v. Goff, (i) Gibbs, C. J. remarked, that in Doe v. Goff there was no devise over in default of issue, whereas that constituted the strength of the other cases which had been cited. But it has been observed that this consideration did not weigh in the House of Lords.

It was argued, and seems to have been con-

(e) 1 Mer. 448. (f) *Supra*, 96.
(g) *Ib.* 64. (h) *Ib.* 114.
(i) *Ib.* 122.

sidered, that the moment a child came *in esse*, the power of disposal was gone, according to the true construction of the words "in default of issue (*i. e.* born,) lawfully to be begotten by me;" or at least that such power of disposal was to arise only in the event of there being no child to take at the testator's death; and that therefore an estate tail, which would have conferred such power of disposition, notwithstanding the existence of issue, would have been contrary to the express intent. But admitting that the testator did not intend an estate tail in the wife, was it clear that he meant children to take in fee? There was abundant authority to shew that the words "share and share alike, if more than one," were not sufficient to overturn the previous words; and, indeed, those words might have had their effect consistently with the legal meaning of the words heirs of the body. (*k*) The words "in *default* of issue" were stronger than words expressive of a dying without leaving issue or without issue; and neither their generality, nor the legal force of the express words of gift, was otherwise restrained by the words "to be begotten by me," than as these words reduced the devise to a gift in special tail (*l*). The gift was still to the whole

(*k*) *Supra*, 131.

(*l*) Devise to testator's wife for life, and after her death to the heirs of her body by him. An estate tail in the wife after possibility of issue extinct, from the end of the period after the husband's death, within which the wife might have had issue by him. Platt *v.* Powles, 2 Maul. and Selw. 65.

succession of heirs derived from that source. The words "to be at her own disposal" might operate either to pass the reversion in fee expectant on the estate tail, or to confer an authority to dispose of such reversion. There was no magic in those words. When a man devises to A. for life, remainder to the heirs of A.'s body begotten by B., remainder to the right heirs of A., he says, in effect, that in default of issue to be begotten by B., the estate shall be at the disposal of the first taker. In fact, this case appears on the whole to have been rather more barren of circumstances in support of the construction at which the Court arrived, than any of the preceding. (*m*) It is no less impossible to reconcile this decision with the *principle* (*i. e.* the general intention collected from the words "in default of issue," &c.) on which the determinations in Doe *v.* Smith, (*n*) Doe *v.* Cooper, (*o*) Pierson *v.* Vickers, (*p*) Frank *v.* Stoven, (*q*) and other cases, were placed by Lord Kenyon and Lord Ellenborough, than it is to reconcile that principle with the legal effect of a gift to heirs of the body, or of a gift for life, remainder to particular persons as purchasers, and in default of issue of the first taker even, as settled by the train of preceding authorities, which (to use

(*m*) "Gretton *v.* Haward is referable to the same ground, (*i. e.* as Doe *v.* Goff,) namely, the absence of intention to entail, and the adequacy of the gift to pass a fee." Prest. Est. 375.

(*n*) *Supra*, 96. (*o*) *Ib.* 64.

(*p*) *Ib.* 114. (*q*) 3 East. 548. *Infra*, Sect. V.

the words of Mr. Fearne,) must be considered as having pronounced the law upon the subject.

The case of Crump & Woolley v. Norwood (r) arose upon a devise of *gavelkind* lands to testator's wife for life; and after her decease, to his three nephews W., I., and R., during their respective lives, as tenants in common; and after their respective decease, he devised the share of him or them so dying unto the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, as tenants in common, and if but one, to such only one, and to his and their heirs and assigns for ever; and if any of his said nephews should die without such issue, *or* leaving any such, they all should die without attaining twenty-one, then he devised the share of him and them so dying unto the survivors and survivor of his said nephews, and the heirs of the body of such surviving and other nephew, as tenants in common, and to hold the same as before directed as to the original share, and with the like contingency of survivorship on failure of issue, and for want, or in default of such issue of his said nephews, to his own right heirs for ever.

Gibbs, C. J., in delivering the judgment of the Court, (s) observed that this was an ejectment

(r) 7 Taunt. 362. 2 Marsh. 161. (1815.)

(s) 7 Taunt. 370.

brought for a moiety of the third part, which was devised to W., the eldest nephew: therefore, his Lordship would state the interest which W. and his *children* after him took in the premises. The devise was to W. for life; and if he had children (for *heirs* here meant *children*) then to them in fee; if he had no children, then the estate would go to the testator's nephews I. and R. It was admitted on all hands (added his Lordship) that this was the true construction.

In this case Doe *v.* Laming, (*t*) and Doe *v.* Goff, (*u*) were relied on as authorities against an estate tail in W., the nephew: but as the point was not much debated by the counsel on either side, and was taken for granted by the Court, the value of the judgment on that point is considerably lessened. It is settled that neither the words importing a tenancy in common, (*x*) nor the superadded words of limitation in fee, (*y*) nor the words limiting the estate over if the issue should die under twenty-one, (*z*) were sufficient to warrant the inference that heirs of the body meant children. The testator clearly intended to exhaust the issue of his nephew; and this case furnishes another authority against the general intention doctrine. As to the circumstance of the lands being gavelkind, the decision in Doe *v.* Laming was not founded

(*t*) *Supra*, 85. (*u*) *Ib.* 122.

(*x*) Jesson *v.* Wright, 2 Bligh 1. *Infra*, Sect. V.

(*y*) *Supra*, 56. (*z*) *Supra*, 125.

on that circumstance alone; and there were in that case expressions thought to be irreconcileable with a descent in gavelkind, which did not occur in the case under consideration.

We have now reached the last of this line of cases; viz., Doe d. Wright v. Jesson, (a); where under a devise of certain messuages, &c. to testator's natural son W. W., for the term of his natural life, he keeping the buildings in tenantable repair, and from and after his decease, unto the heirs of the body of the said W. W., lawfully issuing, in such shares and proportions as he the said W. W. by deed or will should appoint; and for want of appointment, then to the heirs of the body of the said W. W. lawfully issuing, share and share alike, as tenants in common; and if but one *child*, the whole to such only *child*, and for want of *such* issue, to testator's own right heirs for ever. The children of W. W. were held (by Lord Ellenborough, and Bayley, J., the other two judges declining to give any opinion, as they had been concerned as counsel in the cause,) to take as tenants in common for their respective lives.

In order that this decision, and the principles upon which it proceeded, may be fully understood, it may be proper to cite the principal passages from the judgment.

(a) 5 Maule and Selw. 95. (1816) reversed Dom. Proc. Jesson v. Wright, 2 Bligh 1.

Lord Ellenborough.—"I have looked into the cases cited. We are not, however, to draw the sources of our judgment from the mere language or construction of other wills, differently compounded; but from the language and intention of the testator in the will before us; or, as it is sometimes expressed, *ex visceribus testamenti* (*d*). And I feel bound on reading this devise, to say that the words 'heirs of the body,' which in their *ordinary*, and *natural* sense import an estate tail, mean children only. First, there is a power of appointment to the heirs of the body; and, in default of appointment, they are to take as tenants in common. Now a tenancy in common is inconsistent with the supposition that they were to take as tenants in tail by descent. The testator goes on, 'and if but one child, the whole to such only child.' Hence it follows that if there were more than one, the testator supposed that it would go, not the whole to one, but *divisim*, to each a share; whereas if he had meant a

(*d*) This phrase is commonly understood to prohibit the admission of extrinsic evidence, (3 Burr. 1541.) and not to exclude a reference to authorities. The intention of the testator is to be collected from the whole will taken together, and such a construction to be made as will best effectuate that intention. But that collection and inference must be drawn from the will itself, *ex visceribus testamenti;* and all wanton, arbitrary, whimsical, conjectures or intention are to be banished from the mind when it is to judge upon such a question. Wms. 233. This exposition of the words is rather unfavorable to the line of argument pursued in the above case.

tenancy in tail, the whole in permanency and interest would have gone to one. The estate was not to go over on an indefinite failure of issue; but only on failure of described objects, *viz.* the children of W. W. This takes the present out of all that class of cases, where the devise over has been to take effect after a general failure of issue. This decision clashes with *none* of the cases. I do not go into the cases, because they do not apply to a will constructed as this is. We determine this will by the *canons of construction* which the testator himself has furnished."

Bayley, J.—"I agree that where there is a limitation to the heirs of the body of a person who has an estate for life given him by the same will, these are *primâ facie* words of limitation; and that, in order to come to a contrary conclusion, it must be seen plainly that the testator used the words in a different sense. When the same words occur in different parts of the same will, the rule is, that you are to give them the same meaning in the different parts. (*a*) Had W. W. executed the power, the persons taking under it must have taken as purchasers, and as purchasers only. If so, we have established the meaning of the words 'heirs of the body' in one clause. Then we come to another clause. The testator says, for default of such appointment, then to the heirs of the body of W. W. Had he stopped there, the presumption would have

(*a*) But see Doe v. Goff, *supra*, 123. And see 5 Maul. and Selw. 131.

been that the testator after having used the words, where they could not have been intended as words of limitation, was again using them in the same sense. (b) But we are not driven to the necessity of resorting to any presumption, because the testator proceeds to put his own construction upon the words, by directing that the heirs of the body shall take as tenants in common, which could never be, if those words were intended as words of limitation. The case, however, does not rest here; for the testator adds, "if there be but one child, the whole to such only child." Here he was providing for the case of a single child; in the preceding limitation he was providing for a plurality of children; *and if so, there is an end of the case.* It would be useless to travel through the cases; one of them, Burnsall *v.* Davy, (c) comes very near to

(b) But not in the sense of *children* only, for it should seem that "keeping within the line of perpetuity, W. W. might have appointed to any the remotest kin of the body." *Per* Sugd. Arg. 2 Bligh 13.

(c) 1 Bos. and Pull. 215. 6 T. R. 30. This was a devise of all testator's *estates* unto M. O. and the *issue* of his body, lawfully to be begotten, as tenants in common, if more than one; but in default of *such* issue, or being *such* if they should die under the age of twenty-one years, *and* without leaving lawful issue of any of their bodies, then unto P. D. and the issue of his body lawfully to be begotten, as tenants in common, if more than one. But in default of such issue, or being such if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies; or in case neither he, nor any such his lawful issue, if any, should take the surname of B. within two years after coming into possession of the same estates; then to S. G., and his heirs for ever. Power to M. O. and P. D.

this. The reason assigned for the decision in that case was the same which was assigned in Doe v. Laming, that in the devises which included the

to great leases. M. O. (who had no issue) and her husband levied fines, and suffered recoveries. Held that M. O. took for *life*, with a contingent remainder to her children in *fee*, with contingent limitations to the ulterior objects. Buller, J. thought the power of leasing shewed that M. O., was to take for life only. (but see *ib.* 45.) One of the circumstances mainly relied upon by Bayley, who argued against an estate tail in M. O. was that the testator considered that all the issue might die, and yet leave issue; and that therefore he could not have intended to include all the descendants in the devise to the issue of M. O. It was contended that the children took estates tail: but the Court thought that the word "and" could not be construed "*or*," so as to bring the case within the decision in Soulle v. Gerrard, Cro. Eliz. 525. This case differed materially from Doe v. Jackson. "Dissimilar cases are *ignes fatui* that mislead the mind instead of directing it." Wilm. 233.

It may be proper to notice here a late decision, Merest v. James, 1 Brod. & B. 434. (1820.) of a similar complexion with those in the text; though, as it is an instance of a gift to "issue," and not to "heirs of the body," it does not fall so directly within the scope of our present enquiry; the word "issue" being of an ambiguous nature. This was a case sent by the Master of the Rolls, upon a devise of certain freehold and copyhold lands and messuages to trustees upon certain trusts, and subject thereto, to the use of E. A. P., for her life; and from and immediately after her decease, then to the use of the issue of her body lawfully begotten; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then to S. for his life; and from and immediately after his decease, then to the use of the issue of his body; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then to H. for his life; and after his decease, then to the issue of his body lawfully to be begotten; and in default of issue, (omitting the contingency of

limitation to the heirs of the body, a different course of descent was pointed out from that which would otherwise take place."

Before we proceed to any general remarks on those cases, it will be proper to put the Reader in possession of what are, or have been, the sentiments of other writers concerning them, the mere intimation of whose opinion must carry with it greater weight than any arguments which I can hope to advance; and it may be deemed something worse than presumption in me to impugn the authority of a line of cases decided by judges whose learning and ability are conspicuous, even in those judgments that

none of such issue living to attain twenty-one) then to E., her heirs and assigns for ever. The Court certified that E. A. P. took the beneficial interest for her life only. It was argued that A. P. took for life, with a contingent remainder in fee to her children as joint tenants, determinable by executory devise in case no child should attain twenty-one.

The case of Doe *v.* Burnsell was principally relied upon against the estate tail: but there were several ingredients in that case which were wanting here, *viz.* the word "estate" carrying the fee; a tenancy in common; a dying of the issue without leaving issue; a power of leasing; and there the gift over was in default of *such* issue, &c. In Merest *v.* James the only circumstance which could be adduced against an estate tail in E. A. P. was the clause which followed the words "in default of issue" providing for the event of none of *such* issue living to attain twenty-one: but there is ground to contend that as issue in the preceding clauses clearly comprehended all the descendants, it cannot be taken in the latter clause in a less extensive sense. In this clause, the testator may be supposed to contemplate the suffering of a recovery if any of the issue should attain twenty-one.

[illegible] to be most questionable, and from which cases too, lawyers of the first eminence have drawn principles and conclusions, with a view to their practical application. But the reversal of the judgment in Doe *v.* Jesson has deprived the attempt of much of the boldness that might otherwise appear to belong to it; and were it not so, there is abundance of precedent to justify a free discussion of the grounds of these decisions. Of such discussions, indeed, the writers, whose opinions are about to be stated, afford us examples which have at once sanctioned the practice, and proved its utility.

"It was once thought by eminent lawyers (*d*) that the words 'heirs of the body' could not be so restrained by any subsequent words as to carry less than an estate tail, see 5 T. R. 306. But it is now well settled that they may be controlled by subsequent words; therefore, where the words 'heirs of the body' are explained, and [or] vary the line or mode of descent, so as to show a clear intention that the *heirs* shall not take by descent, *they* shall take by purchase." Lawe *v.* Davies, Doe *v.* Laming, Goodtitle *v.* Herring, Doe *v.* Ironmonger, Doe *v.* Goff, and see Mandeville *v.* Lackey, (*e*) 2 Bligh P. C. 352." Sugd. Gilb. Us. 23, *n.* 10.

(*d*) Lord Holt and Lord Somers, *supra*, 84. *n.* (*s*).

(*e*) The case of Mandeville *v.* Lackey, decided on appeal by the High Court of Parliament in Ireland, (1795), turned upon the construction of the word "issue;" and though not of frequent re-

It seems difficult to impute to lawyers of eminence an opinion that the legal sense of the words

ference, it seems to deserve notice, and may be classed with Goodtitle *v.* Herring, *supra*, 106. It arose upon a devise of all the testator's worldly substance of what kind and nature whatsoever that he was then entitled to, or at any time thereafter might be entitled to, or that could be recovered by his representatives, whether real or personal, unto his nephew E. M. during his life *only*, subject and liable to the keeping, dieting, &c. his two sisters C. and M.; and if any disagreement should happen, that they could not agree, testator's will and desire was, that they might then have and be paid the sum of 25*l.* sterling each yearly during their natural lives, &c. And upon the said E. M.'s performing and observing, strictly and truly, without any trouble or confusion, all the aforesaid covenants, conditions, and agreements, the testator then left and bequeathed to him, as beforementioned, all his real estates in the county of T. and county of K., to him during his life *only*, and after the determination of that estate to the said E. M.'s lawful *issue* male, and the lawful issue male of *such heirs*, the eldest always of *such sons* of the said E. M. to be always preferred before the youngest according to their seniority in age, and priority in birth; and for want of *such lawful issue* in the said E. M., to Lord C. and his lawful issue male, subject to certain charges therein mentioned, with a remainder from and after the determination of the said estates to the use of J. S., and after his decease to the use of his lawful issue male, the eldest always taking place of the youngest, who was very well acquainted with the nature and circumstances of the above estates, and would not suffer wrong to be done to those in remainder before him. E. M. levied a fine, and suffered a recovery; and died leaving his wife, the plaintiff in error, *ensient* of a daughter, who was afterwards born. Lord C. brought ejectment against the widow. After several arguments the Court of King's Bench gave judgment for the plaintiff. The question was whether E. M. took an estate for life or in tail?

in question could not be controlled by *any* subsequent expression of a contrary intention: but if such was

This question being put to the judges, Yelverton C. B. delivered their unanimous opinion that E. M. took an estate for life only. His Lordship observed, that it was a rule of construction, particularly in wills, that where words were of an *ambiguous* signification, where they were of such a nature, that they might be sometimes words of purchase, and sometimes words of limitation, and of this nature he took the word "issue" to be, the intent of the devisor must fix the meaning of the words. The question, therefore, was whether the testator had clearly fixed the construction of this word. He explains "issue" by "sons," and he uses "heirs" as synonimous to them. It had been argued (he said) that the words to be explained were to be put in the stead of the words explanatory; that the general words were to be put in the place of the particular words, which qualified and explained their meaning; and that the subsequent words, which from their order were naturally explanatory, should be put in the place of the preceding words. But it was safer to say that the subsequent words might be put in the place of the antecedent ones, the explanatory words in the place of the words to be explained; and then the devise would stand thus:—to E. M. during his life only, and after the determination of that estate to his sons, the eldest of such sons to be always preferred before the youngest, and to the lawful issue male of such sons. The Lord Chancellor said, the subsequent words of explanation seemed to him to point out the sons of E. M. by name, as the persons whom he meant by issue male. The limitation, he thought, was tantamount to the usual stile of legal conveyances, where the estate is given to the father for life, with remainder to his first and every other son in succession in tail male.

In this case the gift was to the lawful "issue," and the relative "such" made the word "heirs" of the same import with its antecedent "issue;" and the *explanatory* words "*such* sons

really their impression, then indeed lawyers of later times have departed widely from the doctrine of their predecessors. The whole will must be taken together, and if it contain clear explanatory words, it appears to make no difference whether they precede or follow the limitation to the heirs of the body. All that is meant to be contended for is,

of the said E. M.," though merely words of reference, were deemed sufficient to determine the signification of the ambiguous word "issue."

The Chief Baron observed, that the rule in Shelley's case was originally "founded on the principles of the feudal law, to prevent conveyances in fraud of the tenure; because if, by such a limitation, the issue could take an estate tail in remainder, as purchasers, it would at any time be in the power of the ancestor to defeat the contingent remainder to his issue, and thus to acquire a dominion over the estate; or, if he did not defeat the remainder, to transmit the remainder to his issue, exonerated from the duties to which the lord was entitled from his tenant coming in by descent." But the ancestor, though he might destroy the contingent remainder, could not acquire the dominion, unless he happened to be the owner of the vested fee. The Chief Baron also observed, that "this rule of interpretation prevails only where the limitation is unaccompanied by words of explanation. If the testator will *explain* what he means by 'heirs of the body' or 'issue male,' if there be a *clear* designation of the persons whom he means to give the estate to, as purchasers, there the *rule* has always been *relaxed*, and the intention of the testator has been effectuated." Clearly if the testator puts it beyond doubt that he intends by these terms to describe certain individuals, as sons, children, &c. there is no rule which denies effect to that intention. Such an explanation takes the devise out of the rule. The rule is not relaxed, but excluded.

that the explanation must carry moral certainty on the face of it, as to the objects to whom the testator meant to apply the term; a doctrine which rests upon the authority of such men as Sir Edward Coke, Lord Holt, Lord Somers, Lord Raymond, Lord Alvanley, Lord Eldon, Lord Redesdale. Words which attempt to modify or regulate the descent prove only that the testator had incongruous ideas in his mind, or that he intended to superadd an illegal qualification to the gift. The objection to Doe *v.* Laming, Doe *v.* Ironmonger, and Doe *v.* Goff, is that *they* (the heirs) were not allowed to take either by purchase or descent. The cases of Doe *v.* Laming, Doe *v.* Ironmonger, and Doe *v.* Goff, where the testator merely attempted to "vary the line or mode of *descent;*" and therefore, as I submit, shewed a clear intention that "heirs" should not be descriptive of individuals, appear to be incapable of standing in the same class with Lawe *v.* Davies and Goodtitle *v.* Herring, where explanatory words were added, which declared to what particular persons the testator meant to apply the word "heirs," and in what order and mode those persons were designed to take.

"From all the cases this corollary may be drawn, that the ancestor will always take an estate tail, under a gift to him for life, with remainder to his heirs of his body, with or without words of superadded limitation, or with or without words of regu-

lation; unless the heirs of the body can, consistently with the general intention, be purchasers, and take either an estate tail, or an estate in fee, in their own right." Prest. Est. 375.

But in Doe *v.* Smith, Pierson *v.* Vickers, and other cases, there were words sufficient to pass the fee to individuals taking by purchase under the description of heirs of the body; yet the first devisee took an estate tail. And in Doe *v.* Goff, and Doe *v.* Jesson, the construction of an estate tail in the first taker was rejected, and children admitted to take, without regard to the sufficiency or insufficiency of the gift to carry the inheritance to them; so that the Courts do not appear to have been uniform in regarding the quantum of interest which the children would take as an essential consideration, nor has the general intention (by which it is presumed the intention to be collected from the devise over is meant) always been consulted. In fact no general propositions applicable to all the cases can be framed. Words of superadded limitation; words of perpetuity; the word "estate;" words contemplating a dying under twenty-one; words that import a taking jointly or distributively; words introducing a devise over, after a failure of issue of the first taker, whether of issue generally, or of *such* issue relatively to a preceding gift to objects of a particular description;—have by turns, and under various combinations, (and they admit of new combinations to an almost infinite extent)

exerted different degrees of influence, and the adjudications and *dicta* concerning them, concurred only in the production of this unfortunate result;—that nothing could be predicated with certainty respecting the legal effect of a devise to heirs of the body connected with any of these circumstances.

If law be a science, and really deserve so sublime a name, it must be founded on principle. (*f*) When decisions cease to establish general principles, they cease to uphold that character, and are of no further value than as adjudications between the parties upon the particular case.

Now, with reference to all the cases stated in this Section it may be asked, whether, though different readers of the devise might form different opinions as to the precise mode in which the issue were intended to take, and put various constructions upon the qualifying or restrictive words, the great majority would not concur in thinking, that the testator contemplated an entail of some sort; that he supposed himself to be making such a disposition as might, by possibility at least, carry the estate through the line of heirs described, under some particular modifications or restrictions, designed either to regulate its inception in the first takers, or its devolution through the whole line,

(*f*) Sir W. Jones' Law of Bailm. 3 Ed. 122.

and of which he himself had probably no distinct conception? By what process of reasoning, founded either upon the confessedly obscure and indeterminate qualifying or restrictive words to be found in these wills, or upon the general understanding of mankind in relation to the term "heirs of the body," could they ever reach the conclusion, that this term was inserted to designate persons into whose composition no ingredient of heirship might enter; to designate those individuals in exclusion of all other persons succeeding from time to time to the character of heir, and instead of perpetuating a successional inheritance in the family of the first taker, to vest in his immediate children the absolute fee simple, transmissible to their heirs general, or, perhaps, estates for their lives only, with reversion to the testator's heir at law, or remainders to ulterior takers, to the utter disappointment, in every shape and way, of every rational intention ascribable to the testator? As men conversant with the acceptation of terms in common use, they would hesitate to adopt such a construction, especially when they were told that it would not in all cases operate to secure the property, or any portion of it, to the children; as the tenant for life alone, if the vested fee were in him, or by agreement with the owner of it, might, before issue born, destroy the contingent limitations, and sell the estate, (g) of which cases the

(g) "In this case (Jesson *v.* Wright, *infra*, Sect. V.) even

books are full. As lawyers, they would duly appreciate the legal force of the expressions used, and weigh the danger of a departure from established principles, against the probable, or perhaps only possible, disappointment of some secondary intention, darkly and disjointedly brought forth, and therefore, it is to be presumed, but blindly and imperfectly conceived.

But to reason this point upon broader principles. If, by any fatality, the man of high birth and ancient possessions, were, in the disposition of his property, to stumble upon so unfortunate a form of words as occurred in the cases under consideration, would it not be monstrous, upon such questionable evidence, to cut up the family inheritance into slices; to parcel out in undivided fifths, or tenths, some proud domain, identified with the honours of his house, and earned, perhaps, by the blood of its founders? If the cases in question had involved in their immediate results, (as they

admitting it to be the *general intent* of the testator to give to Wright only an estate for life, the remainders to the children might as easily be defeated, because he might, by agreement with the heir, have destroyed their estates before they arose." It is observable, that "general intent" is here employed to denote what has been usually termed the particular intent, (see Sect. VII.) but this application of the term is perhaps equally justifiable, for in those cases the intent to give an estate for life only, with remainder to the heirs by purchase, constitute the general intent, or, in other words, the whole scope of the devise.

did in their consequences) the integrity of large estates, the substantial appendages to some barony or dukedom,—would such a dismemberment have been thus silently acquiesced in? Would it have been endured that words, which had borne for centuries a certain appropriate sense, under which those very estates had been transmitted whole and inviolate from ancestor to heir, should now be coined anew, and pass unobserved into legal currency with the impression of a different image? In such a case, indeed, all the energies of conjecture and presumption would, perhaps, have been arrayed against this novel interpretation—their own legitimate offspring; and strong reasons advanced, and irresistible conclusions drawn, to repel an intention big with ruin to an ancient house. But among a people, whose boast it is to possess a constitution which permits the meanest peasant to gratify his pride, and encourages the lowest ranks to soar into the highest, ought not the words appropriated to the creation of an intail in families to be equally sacred under all circumstances? It is a mistake to suppose that the desire to found a family, or perpetuate a name, is confined to station, wealth, or talent; those who are most conversant with the views of testators in general must admit, that this species of ambition is no less the infirmity of vulgar than of noble minds. That feeling which prompts men to entail their estates, is as innate in our breasts as the dread of extinction, and as universal as human nature itself. But it may be urged,

perhaps, that nature and morality enjoin every parent to provide for *all* his children; (*h*) and that the presumption must be that he intends to fulfil that obligation. Admitting this reasoning to be just,—how does it apply to the great majority of cases? When a testator (as in Doe *v.* Jesson) selects his eldest son, makes that son tenant for life, and limits the inheritance to his issue, there, the testator in passing over his own younger children, rejects altogether the dictates of nature and morality where they touch him most nearly; and cannot be presumed on any grounds, either moral or rational, to intend a distributive disposition in favour of a progeny one degree more remote. The favourite object of the great bulk of testators in their use of the words "heirs of the body," although mixed up with other incongruous expressions, is, (however vain the hope) to transmit to their children's children some memento less perishable than the opinions of men, and to make their bounty felt and acknowledged by their latest posterity.

In these cases, the primary consideration, *i. e.* the *objects* of the testator's bounty, appears to have been sacrificed in a great measure to secondary considerations, *i. e.* the mode of taking, and the quantum of interest to be taken; and the order in which it had been usual to consider the words of a devise seems to have been reversed. The cir-

(*h*) See 1 Watk. Cop. 133.

cumstance that if "heirs of the body" are held to mean children, or other individuals, the will contains words under which they would be tenants in common, or take the fee, &c., may tend to palliate or soften the construction, but proves nothing as to the objects to whom the testator intended to apply these words, or, at any rate, does not carry the evidence upon this point beyond conjecture. It is undoubtedly a sound rule to give effect, if possible, to every word of the will; but I must confess myself altogether at a loss to understand how that principle is advanced, or maintained, by a construction which *changes* one of the words, and *that* a most material one, in order that the rest may operate.

By construing "heirs of the body" to be a description of the individual heir or heirs at the death of the ancestor, the words importing a joint tenancy, or tenancy in common, might (as in the event of there being a daughter, and a child of a deceased daughter, &c.) take effect. This, though an illegal, would be a less violent construction. But if we must necessarily depart altogether from the plain meaning of the words, in order that there may be a joint-tenancy, or tenancy in common; if other persons than heirs must be let in,—why restrict *our* bounty to children? Why not extend it to all the issue in being at the death of the first taker to take *per stirpes*? Why exclude the family of a child dying in the testator's lifetime? The same authority which constitutes the children devisees,

might recast the whole frame of the devise, and make a more provident disposition of the property. A testator who devises to heirs of the body may reasonably suppose that he has used a term comprehensive enough to take in all the issue, and that they may all eventually succeed under it. Under this impression he makes no provision for the event of a child dying in his lifetime leaving issue. The construction in question excludes such issue. It may be said that it deprives them of nothing but a mere chance of succession. But, in contemplation of law, that chance is valuable; and if it were not so, it could not legally be denied them.

The principles on which these decisions proceeded, if once permitted to gain an ascendancy, might be carried to an extent which it is frightful to contemplate. They are bold and daring in their first essay; they respect not the grey wisdom of antiquity; nor stand in awe of professional opinion. Technical reasons, upheld by old repute, and grown reverend by length of years, and which ought to bear great weight and authority, (*i*) must give way to new technical reasons (for it will be found that the new doctrines are equally technical) which appear with as little dignity as an usurper just seated in his chair of state. (*k*) If words of the best understood, and most determinate import, enforced by an act of parliament, (*l*) which expressly

(*i*) 1 Eden 416. *Per* Lord Northington. (*k*) *Ibid.*
(*l*) Statute *De Donis Conditionalibus*, 13 Edw. 1. c. 1.

declares that the will of the donor shall be observed, are inadequate to secure the intended devolution of an estate in a particular line, from being utterly overthrown and displaced by a few loose unguarded expressions, transcribed, perhaps, from some blundering precedent, some "family receipt for an intail," and to which the testator probably never attached a distinct meaning, or any meaning at all; the great majority of those who sit down to make their wills, with the intention of entailing their estates, and preserving them entire, must be in danger, not only of failing in the accomplishment of that object, but of bequeathing to their posterity a suit for a partition, and creating a fruitful source of family dissensions.

It was stated in Jesson *v.* Wright (*arguendo*) that the case had been decided in the Court below on its own merits, without any reference to authorities; and certainly some of the expressions which fell from Lord Ellenborough seem to treat cases, and rules of law, as very unsafe guides in the construction of wills. (*l*)

His Lordship observed that the testator had laid

(*l*) "Wills, and the construction of them, do more perplex a man than any other learning; and to make a certain construction of them, this *excedit juris prudentis artem*: but I have learned this good rule, always to judge in such cases as near as may be, and according to the rules of law." *Per* Coke, C. J., 2 Bulst. 130. The neglect of this sage advice has filled the books with contradictory decisions.

down his own "canons of construction." If by "canons of construction" his Lordship meant directions superseding those settled rules which govern the exposition of legal instruments, a testator can no more lay down such canons, than he can lay down canons of descent, contrary to those established by law. But even if it were permitted to every testator to impose upon courts of judicature the duty of learning, and applying his canons, where shall we find any such canons in the case of Doe *v.* Jesson? The words themselves, which are to be the subject of construction, cannot be the canons. The thing to be expounded cannot be the rule of exposition. An intent to control the words "heirs of the body" must be sought for in other expressions; and if it cannot be found expressed in words, the safe, the rational, the legal conclusion is, that it never existed in fact. If the doctrine in question be received, it were better at once to close our books, and trust to the strength of our natural endowments.

Language very similar to that attributed to Lord Ellenborough in Doe *v.* Jesson appears to have been held by Eyre, C. J. on more than one occasion. Thus in Burnsall *v.* Davy, (*m*) his Lordship is reported to have said, "Technical rules are not to be relied upon in explaining the intention of testators; and yet cases of intention are much em-

(*m*) 1 Bos. and Pull. 220.

harrassed by authorities." And in Doe d. Dacre v. Dacre, (n)—"I think we do not want the authority of cases at *this time of day*, to establish the rule of law, on which we are to proceed, to be this, that in the construction of a will, whether the words used be technical or not technical, or even of vulgar and common parlance, the Court is to put that sense upon them, in which, on a fair consideration of the whole *context*, they collect that the testator intended to use them. In this case the words on which the difficulty arises, are by no means technical: they may import many things according to the subject matter; and we are to enquire in what sense the testator meant to use them. If we can discover that, the next consideration will be whether the words will bear that sense; or whether we are tied down by any rule of law to understand them in any other, *though indeed I can hardly put such a case.*" And again in the same case, "but I do not intend to *encumber* myself with cases. Decisions upon other words, something like those in question, in other wills, where the whole *context* of those wills must be gone into, can afford very little assistance." And this dislike upon principle to case-learning was strongly expressed by Rooke, J., in terms, which imply something of a personal feeling of the inconvenience attending it.—"Indeed, I have long been *tired* of looking into cases upon wills."

(n) 1 Bos. & Pull. 256.

So Alton, J., in Perin *v.* Blake, declared "that every case stands upon its own bottom; others only confound."

If, indeed, cases were to be looked into merely for the purpose of ascertaining that there has been no previous decision upon the very same words, with which the proposed determination can clash, the task would be sufficiently irksome. But when a rule of law is established, a judge is not warranted, however strongly he may reprobate its tendency, in confining its application to cases precisely the same *in specie et terminis* with those in which it has been previously applied; but is bound to respect the known, or presumable, principle, on which the rule is founded, (and the rule in Shelley's case, for instance, is founded on a principle hostile to that *scheme* (*o*) of disposition

(*o*) The rule requires an identity in the gift or conveyance creating the two limitations: a use limited by the exercise of a power of appointment is, in point of legal construction, considered as inserted in the instrument creating the power. A question has been raised, and much debated, whether if an estate be limited to the use of A. for life, remainder to such uses as B. shall appoint, and B. appoints in A.'s lifetime to the heirs of A., the limitations will unite. Mr. Fearne contends (Cont. R. 57.) that they will. He says that they have every quality of relation and connection that they would have had if both had been specified in the original deed, except in regard to their time of *vesting* or *taking effect*, which he says the cases prove not to be essential to the operation of the rule. Some objections, however, have been urged against the union of the two limitations. Butl. Co. Litt. 299 *b. n.* Prest. Est. 310. And see 2 Fonb. Eq. 5th ed.

which while it designs a succession of the inheritance to a class of persons, under the denomination

edit. 76. *n.* (where some error has crept in.) One objection, Prest. Est. 310., is stated to be, that an interest once determined to be an estate for life, without any reference to, or connection with, the inheritance in the tenant of that estate, does by subsequent matter, and in some cases by the act of a third person, become an estate of inheritance;—another, that the heirs do not, in reference to the estate of their ancestor, take by way of remainder. Lord Coke defines a remainder to be a remnant of an estate in lands, expectant on a particular estate, created together with the same at one time. Co. Litt. 143 *a.* 49 *a.* The question seems to be whether a constructive insertion, by intendment of law, of the limitation to the heirs, in the deed creating the freehold, has the same effect as its actual insertion would have had, with reference to the rule? Whether the two limitations are, in the eye of the law, parts of the same gift or conveyance? A gift or conveyance by A. to such uses as B. shall appoint, is a general bounty, indeterminate as to its objects, and to be directed by B. into such channels as he may think fit. When B. appoints to the heirs of C., he merely ascertains the objects; and it becomes a gift or conveyance from A., on the nomination of B., to the heirs of C. The freehold expressly limited to the ancestor by the original deed, and the inheritance limited to the heirs through the medium of a power contained in that deed, are both parts of the same transaction, and owe their existence to the same bounty. The law rarely permits that to be done *per indirectum* which cannot be done *per directum*. The reasons seem to preponderate in favour of the union of the two limitations. A similar question would arise where the estate is limited to A. for life, remainder to such uses as A. shall appoint, remainder to the heirs of B., and A. appoints to B. for life; or where the limitation of the freehold, and the limitation of the inheritance, both arise under the execution of the same power, or of several powers contained in the same deed.

of heirs of the ancestor, unfounded in him as the basis of such succession, likewise designs to that ancestor a particular estate of freehold) and to apply the rule to all cases, whose circumstances do not place them beyond the reach of the principle; looking back to the determinations of his predecessor, as so many judicial readings upon the rule, and guides to the true application of it, with an anxiety to secure and transmit to posterity, the certain benefit of settled doctrines, rather than the speculative good of untried opinions. Different judges may allow to the circumstances of any particular case different degrees of influence; and, admitting the principle, may not feel themselves bound down to the strict letter of its application in other instances; (for, however "straight-laced" these notions may appear, it will be found that a very large discretion must ultimately reside, as it ought, in the judge,) but such influence must be proportioned to the value which the judge may set upon the circumstances, and not to the value which he may set upon the rule, or any of the settled distinctions engrafted upon it. To exclude the rule on the ground that the circumstances are different from those of former cases, without shewing that the difference is such as may not unreasonably be deemed to constitute a sound distinction, is a legislative, and not a judicial function.

The doctrines of equity, especially those which had their rise in a desire to soften the harsher

features of the law, would seem most easy to be departed from, when they prove, not merely an inadequate remedy, but a positive evil, less tolerable than that which they were designed to avert: but we are taught a salutary lesson on this head, by the result of an attempt made by Sir William Grant to disburthen our equitable code of the doctrine of illusory appointments, (p) (which had been stigmatized on all hands,) by substituting for the discretion of the Court a scale of figures, drawn from the relative proportions, in former cases, of the shares appointed to the trust funds; an attempt which the Lord Chancellor did not think himself at liberty to sanction, conceiving it to be a duty imposed upon the Court, to apply the principle, to the best of its judgment, in every case which might arise, until it should be relieved from the mass of difficulties and absurdities incident to the doctrine by higher authority. (q) This endeavour to rest the decision of such cases on a mere comparison of figures seems to bear a strong resemblance to some decisions, which have departed from former authorities, in which a rule of law is acknowledged to have been well applied, on no other apparent foundation than a mere discrepancy in words.

The distinction relied on should present at least

(p) Butcher v. Butcher, 9 Ves. 382. 1 Ves. and B. 79. Bax v. Whitbread, 10 Ves. 31. 16 Ves. 15.

(q) Bax v. Whitbread, 16 Ves. 18. 26.

the semblance of something substantial. If we examine into the recent cases, in which the construction of the words "heirs of the body" was considered as wholly unprejudiced by decision, because the will was "differently compounded" from those wills on which contrary judgments had been pronounced in former cases, we shall find it difficult, on the most careful analysis, to detect any new ingredient. This method of distinguishing cases, if pursued, must reduce the judge to a mere collater of words and syllables. It were better at once to break through the triple lines drawn round the rule of law, which says that these words, unless explained in the strongest terms, include all descendants; (r) and, without denying its authority, open a way for the exercise of the most unlimited discretion in its application to all future cases. Such a course would be more manly at least; and might perhaps be thought to receive some countenance from the observations of Lord Kenyon, (s) that "if a rule be established, it is not impaired, because a judge, meaning to be judged by it, mistakes the application of the rule to the particular case before him; that, without minutely examining all the cases, or saying whe-

(r) "The words "heirs of the body" *primâ facie* mean all descendants; and it is likewise a rule of law that all descendants shall take under these words, unless they are clearly qualified and restricted by other words." *Per* Lord Eldon, Jesson *v.* Wright, 2 Bligh 49.

(s) 7 T. R. 148.

ther he (Lord Kenyon) did or did not agree with them, it was sufficient for him to abide by the principle established by them; that the principle is the thing, which we are to extract from cases, and to apply in the decision of other cases;"—confirmed by the declaration of Lord Eldon, (*t*) that when a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner; that the principle being once acknowledged, the only difficulty consists in making the most accurate application of it." But all general propositions in matters of law must be received with caution, (especially when abstracted from the particular cases which produced them) and with many implied qualifications. There is nothing in these positions, rightly interpreted, (if we except so much of Lord Kenyon's doctrine as disclaims a minute examination of cases, while we are yet required to extract principles from them) which may not be admitted, without danger of holding out a warrant for an unlimited discretionary application of any rule of law. These dicta inculcate the necessity of looking into cases: they substitute for the trammels of words the legitimate authority of principles; they do not define a legal principle to be something existing independently of cases;

(*t*) 2 Bos. and Pull. 24. And see 1 Cox 407.

they do not deny that the uniform application of a rule of law to cases substantially the same with the case before the Court may constitute a binding principle, decisive of its application in that particular instance; nor even that an application of the rule, originating in error, may grow into a principle, and root itself in the system of our jurisprudence. But how is this reconcileable with the language of the Court in Doe *v.* Goff, and Doe *v.* Jesson? Those judgments professedly found themselves on the difference of expression. They admit the rule as something antecedent to decision, while they involve a denial of the principles to be deduced from its unquestioned application in previous decisions; holding themselves bound by the letter, and not by the spirit, of those decisions.

In the extracting of principles from cases, and their judicious use, consists one of the most arduous and important duties of a judge: (*x*)—that duty, indeed, which from the undigested and multifarious nature of the mass whence they are to be drawn, must demand, up to the latest period of a life devoted to legal investigations, the full exertion of every faculty; involving too the delicate and difficult task of deciding upon the doubtful claims of particular decisions to the force and authority of settled law, a province which alone may be deemed to afford abundant scope for talent and discretion.

(*x*) "The best use of cases is to draw settled rules and principles from them." *Per* Smythe, Lord Com. Wilm. 397.

As, in order to collect the intention of the testator, we must read the whole will; so, in order to extract the principle correctly, we should examine all the cases. The only mode of abridging this labour, without legislative interference, is, by observing, and (if I may so express myself) producing, the most marked lines of distinction afforded by the judgments of men, "our equals in genius, and perhaps our superiors in learning," without too nicely examining whether those lines all converge to that point, which we esteem to be the focus of equity, and right reason.

If principles afforded by previous determinations be discarded, as only calculated to embarrass cases of intention, (and what other end can such doctrines propose to themselves?) we shall have nothing left but a few abstract rules of law, like that in Shelley's case, of which since the reason, though not certainly known, is deemed to have ceased, the authority will not long survive; or which, if still permitted to deform our legal code, will be reluctantly and sparingly applied to cases, literally falling within the rule, or the decisions upon it. Amidst this "labefaction of all principle," INTENTION will be set up as the sole directrix; and the whole law of the testament, which is now inconveniently spread through so many volumes, will be compressed within the four corners of the instrument itself. In this state of things, uses will be trusts, and trusts uses, as best suits what has

been somewhere termed "the general scheme" of the will; distinctions that bear the stamp of the highest authority will be submitted to the touchstone of common sense; (y) shrewd conjecture will be necessary inference; (z) nay, every testator will

(y) "The Chancellors have, in their decrees, made many distinctions, particularly between the trust, and legal estate; and, indeed, even in the trusts, between trusts executed and executory. Neither of these distinctions is founded in sense." *Per* Lord Mansfield, 1 Coll. Jur. 295. "There is no sound distinction between the devise of a legal estate, and of a trust; and between an executory trust, and one executed: all trusts are executory; and in any shape that a will appears, the intention must govern." *Ib.* 321. "I see no grounds for the distinction besween trusts and legal estates; nor do I think it established." *Per* Aston, J., *ib.* 306.

It is scarcely necessary to state that the distinctions thus denounced, and denied to be law, are now firmly established, and admitted to be founded in sound legal reasoning. A devise to A. for life, remainder to the heirs of his body, is a legal estate tail in A. A devise to a trustee in fee, in trust for A. for life, and after his decease in trust for the heirs of his body, is a trust *executed;* and vests, by force of the gift, a corresponding equitable estate in A. A devise to a trustee in fee, upon trust to *settle* the estate to A. for life, and after his decease to the heirs of his body, is a trust *executory*, referring the estates of A. and his issue, to an act to be done under the authority of the Court of Chancery, which executes the trust by means, and upon principles unknown to courts of law, not arbitrarily, but in strict conformity to established practice. Thus courts of law and equity travel together as long as there is any analogy between the objects of their jurisdiction; and separate only at that point where the limited jurisdiction of the former will not allow it to proceed any further.

(z) See 3 Maul. and Sel. 50.

favour us with his own canons of interpretation, and the relative will cease to refer to the last antecedent; the opinion of the ablest practitioner upon the construction of a devise, not word for word the same with any previous case, will be a mere speculation on the disposition of the Court for the time being; nothing in relation to devises will be certain, but that INTENTION must ultimately be absorbed in DISCRETION.

To this point the doctrine advanced in the cases on which we have been commenting appeared to tend. The positive force of the words "heirs of the body," as well as their relative effect under the rule in Shelley's case, had been in a great measure lost sight of, and was scarcely hinted at in any of these cases. The principles which the determinations upon these words had introduced were rapidly fading away. No ingenuity could engraft the modern decisions upon the systematic treatises which had been written upon the rule, (*a*)

(*a*) "That the word heirs, [words, 'heirs of the body'] in reference to limitations of legal estates, may be a word [words] of purchase, even in a will, it [they] must, in terms, be explained to be of the same import with the word 'children,' and used to describe them, without extending to the whole line of successors. *Or* they must be used, and be interpreted, in this sense, or otherwise cannot have any effect, according to the intention with which they are introduced into the will. *Or* they must be used to describe a particular person, or several persons, or a class of persons. *Or* they must engraft a new order of succession, by giving an inheritable interest to be de-

for they went to derange and confound all the principles there laid down; and it became impossible for any practitioner to give a decided opi-

rived from this person, these persons, or this class of persons. *Or* they must be used as ascertaining a person already in existence; giving an estate to him immediately. *Or* because, from the *context*, it may be collected that no intail was intended to be created." Prest. Est. 369. Those who have acquired a facility in the practical application of these rules, will come prepared to distinguish and classify decisions apparently the most irreconcileable: but as this can be the lot of few, it is essential that other rules, of a less abstruse and complex nature, shall be laid down, which may place the construction of a devise within the reach of such powers of discrimination as are granted to the many; or the testator's intention must often fail of effect from the incapacity of the human mind, as ordinarily constituted, to apply the rules necessary to extract it.

It is true, as observed by Lord Ellenborough, in one of the late cases, that the whole context must be gone into; and that decisions upon other wills, of which the context is different, can afford but little assistance. We must not, however, suffer ourselves to be misled by the word "context;" nor suppose that it furnishes us with a key to the exposition of the devise before us, or a general bond of reconciliation between the cases. The truth is, that in many of the cases in question, there was nothing which could be fairly termed context, nothing but the bare devise on which the question turned. To say that the force of the words "heirs of the body" must depend on the context, or that the decision in any particular case, which is apparently irreconcileable with other cases, was governed by the context, is not to remove any of the difficulties, but merely to collect and concentrate them in a single expression.

"In wills, the object to which the Courts give particular attention, aiming to ascertain the general intention, and to carry that object into effect, will always render it essential to enquire

nion upon a title derived under devises of this nature, where no fac simile could be found in the books, without hazarding at once his own reputation, and the security of his client. Mr. Justice Aston, in Perrin v. Blake, expressed his fears, that if the intention were not allowed to govern, (b)

whether there was any intention to intail, and who was to be the donee in tail; and the donee under the gift for life will have an estate tail, or for life, according to the result of that inquiry." Prest. Est. 376.

The first inquiry must necessarily be whether the testator had an intail in contemplation. Where there is a gift to heirs of the body, it affords strong *primâ facie* evidence of an intention to intail; in such case the next inquiry will be whether that evidence is irresistibly repelled by other testimony, which affixes another specific meaning to those words, reducing them to a mere description of individuals; and if the words be so explained, then, and not till then, the question will arise what estates those individuals can take under the words of the devise; for taking in the character of individuals, they must take in the quality of individuals. It is immaterial whether the testator did, or did not intend, the first devisee to be the donee in tail, where the limitation is to the heirs of his body; for, unless these words be explained, their effect will be determined by the rules of law. In the instance of an express gift for life, the testator never intends the tenant for life to be the donee in tail.

(b) In Soulle v. Gerrard, Cro. Eliz. 525., it was argued that stat. 32 Hen. 8. gives liberty to every owner to dispose of his land by devise at his will and pleasure: but the Court answered, that the words in the act, that he may dispose at his will and pleasure, were not to be construed so largely as had been said; but he may dispose at his will and pleasure, so as it be according to the rules of law; otherwise it is a vain will.

there would be no possibility for a testator to dispose of his property, without keeping a conveyancer in his house: (c) but there was now just ground of apprehension, lest men, even with that assistance at their elbow, should still be found to die intestate, so far as regarded any will of their *own*. Indeed it seemed probable, that they might be too much busied in defending the possession during their lives, against claimants stimulated by the prevalent opinions to litigate the title as derived under some prior will, to allow them leisure for much concern about a thing so precarious as the destination of the property at their death.

(c) 1 Coll. Jur.

SECTION V.

Review of the Judgment of the House of Lords in Jesson v. Wright.

The Grounds and Reasons of that Judgment, and its effect in re-establishing the Rules of Law.

THE foregoing is not an exaggerated representation of the state of the doctrine at the period when the decision of the Court of King's Bench in Doe *v.* Jesson (*a*) was reversed by the House of Lords. (*b*)

The arguments adduced in the House of Lords against the construction of an estate tail in W. W. assumed this shape,—that the words "heirs of the body" in the power, could not be taken in their strict technical sense: but must have been used to designate particular objects to take by purchase, as the donee could not appoint to issue indefinitely; that the testator could not intend to use

(*a*) *Supra*, 139. (*b*) Jesson *v.* Wright, 2 Bligh 1.

the same words in a different sense, in the limitation in default of appointment, where the mention of a *child* indicates the particular objects whom he had in contemplation; and that, therefore, as well in the power, as in the limitation in default of appointment, he must be understood to mean children, and nothing but children; that the words "in equal shares as tenants in common" were inconsistent with an intention to give an estate tail to W. W.; and that the words "in default of such issue," introducing the devise over, must be expounded "in default of such children."

But in this case, decided upon great consideration, it was held, that, assuming "heirs of the body" in the power, to contemplate objects to take as purchasers, it was not a necessary inference that the same words in the subsequent limitation must also operate as words of purchase; that though it might be manifest from the limitation in default of appointment, that the testator had children in his contemplation, yet he did not negative the legal conclusion from the words "heirs of the body;" that he contemplated children, and more remote issue; and that he meant heirs of the body, including children sustaining that character; and if that character should happen to centre in an only child, then such child to take the whole; that the words attempting to create a tenancy in common must be rejected as inconsistent with a gift to heirs of the body; and that the words "in default of such

issue" meant in default of such heirs; and that Doe *v.* Goff was not law.

The judgment, therefore, of the House of Lords in this case establishes beyond the reach of controversy,—1. That in order to explain away the appropriated meaning of the words "heirs of the body" there must be express words, or necessary inference or implication. 2. That the occurrence of the words "heirs of the body" as a designation of children, or other objects within the line of perpetuity, in a power of appointment, does not raise a necessary inference or implication that the same words are not used as words of limitation in the gift in default of appointment. 3. That if the gift be to the heirs of the body, the express mention in that gift of any particular class of inheritable issue, as children, sons, &c. in terms which do not clearly exclude the remoter descendants, will not narrow the operation of the words of gift. 4. That a testator having once manifested an intention that heirs of the body as such shall take, he cannot superadd to, or qualify, that intention; and that all expressions assuming to modify or regulate the course of devolution, or, in other words, to lay down new canons of descent, are, instead of being made the ground-work of a special exposition of the words "heirs of the body" to be rejected as vain and futile; and that when we find the testator giving to the heirs of the body, to take in that character, and under that denomination, all en-

quiries as to what he meant besides, in relation to that gift, are wholly impertinent. 5. (By over-ruling Doe v. Goff) (d) that the words "heirs of the body," having so fixed and comprehensive a sense, do not require any aid, nor derive any additional force, from other expressions of (what is termed) a general intent that the estate shall not go over till an indefinite failure of issue of the first taker. And, 6. (By over-ruling Doe v. Goff) that a devise over to take effect if none of the issue of the first taker shall live to attain the age of twenty-one, is a circumstance which does not repel the legal meaning of the words "heirs of the body," but according to Lord Redesdale's opinion rather confirms it.

In comparing the devise in Jesson v. Wright with that in Willcox v. Bellaers, as regards the application of the rule of law, it will be seen that the former was marked by circumstances which rendered it much more intractable than the latter; by circumstances, indeed, which the Court below had allowed to operate in exclusion of the rule. In Willcox v. Bellaers we are not pressed by the difficulty of attributing to the words "heirs of the body" two different senses in different clauses of the will; on the contrary the argument against an

(d) In Doe v. Goff there was no devise over after a general failure of issue. Lord Ellenborough founds his argument on the absence of general intention. There were words importing a tenancy in common, on which the Court also relied. *Supra*, 123.

estate tail in H. T. Willcox ascribes to different words the same sense; (*e*) nor are we reduced to the necessity of rejecting any repugnant or inconsistent expressions, nor is any word of purchase appended to the limitation to the heirs of the body.

It may perhaps be thought that the absence of superadded words of limitation, or other words sufficient to give the fee to the children, had considerable weight in Jesson *v.* Wright, and distinguishes it in principle from other cases reviewed in the fourth Section. To those cases we may add, as regards some of the principles laid down, the case of Doe d. Thong *v.* Bedford, (*f*) where the testator devised certain messuages, &c. to his wife for life, and after the determination of that estate, to trustees to preserve contingent remainders, and from and immediately after the decease of his wife, to his daughter E. B. for life, with remainder in like manner to trustees to preserve contingent remainders; and from and immediately after the decease of his said daughter, to the heirs of her body lawfully begotten; and for want of such issue, then to O. W. T., and his heirs and assigns for ever; it being the testator's will and meaning that after the decease of his wife his daughter should have only an estate for life in the

(*e*) "If a man makes use of different words he must certainly mean a different sense, and this is a rule in the construction of acts of parliament, deeds, and wills." *Per* Willes, J. Wilm. 395.

(*f*) 4 Maul. & Sel. 362.

said premises; and that after the decease of his said wife and daughter, the said premises should go to and vest in the heirs of the body of his daughter; and that for want or in default of such issue, the same should absolutely go to and vest in O. W. T. and his heirs; and that his daughter should not have any power to defeat his intent and meaning in that respect; and he gave power to his trustees and their heirs, and directed them from time to time and at all times thereafter, to do all acts necessary for fulfilling such his intent and meaning, or the more effectually settling the said premises agreeably thereto, and the prevention of any thing being done to defeat the same, &c. It was held that E. B. the daughter took an estate tail. It had been previously determined (g) in a suit in equity upon the same will, that this was a devise of *legal* estates to the daughter and her issue; and consequently that the direction to settle, &c. had no operation. Le Blanc J. said that the intention of the testator to give his daughter an estate tail was plain, (not because the words of gift were sufficient to create an estate tail, but) *because* it was not to go over till a failure of her issue, and *because* he had not superadded words of limitation to the heirs of the body, to shew that he meant the *children* of his daughter *only*. And Dampier, J. thought it clear by the limitation over for want of issue of his daughter, that the testator used "heirs of the body" as words of

(g) Thong v. Bedford, 1 Bro. C. C. 313.

limitation. But if there had been superadded words, and no limitation over,—what would the Court have done? Could they, consistently even with the doctrine of the cases discussed in the fourth Section, have held that the limitation to the heirs of the body was a limitation to children in fee? In all those cases, there were words importing a joint tenancy, or tenancy in common, &c. on which the judges relied. The determinations in Coulson *v.* Coulson (*h*) and Hodgson *v.* Ambrose, (*i*) which settled the law upon the construction of wills similar to that in Thong *v.* Bedford, were not founded on the circumstance of a gift over, or the absence of superadded words.

It is certainly matter of regret that *all* the minute circumstances on which the Courts below had founded their judgments in the cases discussed in the fourth Section were not combined in Jesson *v.* Wright: but I apprehend it will not be difficult to shew that this determination is in principle a direct authority against the controlling influence of superadded words of limitation in fee engrafted on "heirs of the body" in the plural; and that the Courts below cannot allow them to operate in exclusion of the legal sense of the words "heirs of the body," without impeaching the grounds and reasons on which alone the judgment of the House of Lords professes to stand.

(*h*) 2 Atk. 246. 2 Stra. 1125. (*i*) Dougl. 331.

An attempt has been made, in the discussion of the case of Willcox v. Bellaers (k) to shew that the superadded words of limitation in fee must depend for their effect on the previous and independent sense of the words upon which they are engrafted; and are utterly powerless till those words are deprived by other means of their legal force. For as *primâ facie* the words "heirs of the body" include all the descendants, the words "and their heirs" are a mere expansion of the idea included in the former. To allow them to control "heirs of the body" is, in effect, to adopt the logic, which Mr. Justice Buller condemns as bad, (l)—to make the very words sought to be explained away their own expositors. Several solemn adjudications establishing the inefficacy of these superadded words have also been adduced. (m)

The word "issue" may be restrained by slighter evidence of intention than the words "heirs of the body." But words of limitation in fee superadded to the word "issue," aided by circumstances favourable to a restrictive construction of that word, have been adjudged insufficient to make it operate as a word of purchase. In Frank v. Stoven, (n) where the testator devised all his estates to B. F.

(k) *Supra*, 55.

(l) Dougl. 343.

(m) *Supra*, 56.

(n) 3 East. 548. (1803.) And see King v. Burchell, 1 Eden 424. *Infra*, 182. *n*.

for his life, without impeachment of waste, and with power to make a certain jointure thereout for any future life, and from and after his decease, then to the issue male of the body of B. F. lawfully begotten, or to be begotten, *and their heirs*, and in default of such issue, then over; B. F. was held to take an estate tail. (*n*)

(*n*) "In King *v.* Burchell, and in Frank *v.* Stoven, the devise was to one for life, remainder to his issue male, and to their heirs, *share and share alike;* and for want of such issue, then over: and yet, notwithstanding the words of superadded limitation, and the words of regulation and modification, the ancestor took an estate tail." Prest. Est. 374.

In Frank *v.* Stoven, there were no words importing division; and in King *v.* Burchell, (Amb. 379. 1 Eden. 424.) the words "share and share alike" occurred, not in the devise of the estate in question in the cause, but in the devise of another estate. And it should be observed, that though words of limitation in fee were superadded, yet there was a proviso against alienation by the devisee for life or his issue, which was considered by Lord Northington "as a plain declaration of the testator himself that he had given such devisee an estate tail, and that he intended to restrain him from a legal dominion over it." The testator devised his estate at H. and L. to his cousin J. H., to hold the same during the term of his natural life; and, from and immediately after the determination of that estate, he gave the same to the issue male of J. H., lawfully begotten, and to his and their heirs share and share alike; and for want of such issue, then he gave the same to the issue female of J. H., lawfully begotten, to her and their heirs, share and share alike, if more than one; and for want of such issue, then he gave the same to his (testator's cousin) W. F., his heirs and assigns for ever. And after taking notice that he had covenanted to settle 50*l.* on his wife, he devised *certain premises in M.* to her, to hold to her as part of her

The principles on which the judgment of the House of Lords proceeded entirely negative the idea that words of superadded limitation in fee,

jointure, for and during her natural life; and from and immediately after the decease of his wife, he gave and devised the same unto the said J. H. for life; and from and immediately after the determination of that estate, unto the *issue male* of the body of J. H., lawfully to be begotten, *and to their heirs;* and for want of *such* issue male, to W. K., his heirs and assigns for ever. The testator then inserted the following proviso:—"Provided always, and my mind and will is, that the several bequests and limitations of the premises in H. L., and M., so devised, bequeathed, and limited unto J. H., and such issue male and female, is upon this express condition, that if he, the said J. H., *or his issue*, or any or either of them, shall at any time or times hereafter alienate, mortgage, incumber, or otherwise commit, any act or deed whereby to alter, change, or defeat the same bequests and limitations, or any of them, hereinbefore limited and appointed of the said premises, that then, he, the said J. H., and all and every such other person or persons so alienating, mortgaging, or otherwise incumbering, altering, changing, or defeating, the same bequests, or any of them, shall pay or cause to be paid, and I do hereby charge the said premises, with the payment of 2000*l.* unto such person or persons, and his and their heirs, who might, could, should, or ought, next to take by virtue or means of any of the bequests, devises, or limitations, hereinbefore by me given, devised, or bequeathed." It was held that J. H. took an estate tail in *the premises in M.* Lord Northington observed, that if the testator intended the issue to take as purchasers, he intended them to take as joint tenants; and if J. H. had ten sons, and the youngest survived, the nine children, and their issue, should be disinherited, which was an intent too absurd to be supposed. That it was manifest the testator intended the word "issue" as a word of limitation, because he intended J. K. should take the estate for want of

or other words capable of carrying the fee, would have induced a different decision. We shall presently see that the judgment manifests throughout the utmost anxiety to maintain established rules and principles of law. Is it possible for a moment to suppose that the learned persons who delivered that judgment would have suffered such expressions to be set up against a series of concurring authorities;—that they would have solemnly laid it down, as a sound legal principle, that the *quantum*

issue male of J. H., whenever that default of issue happened; and that there was not a colour to say in grammatical, liberal, or critical construction, that there was any period to which that want of issue was restrained; and here was a plain limitation of the whole fee in particular estates, and remainders. The Court therefore did not rest the decision solely on the proviso. Indeed since J. H., as tenant for life, might have aliened so as to defeat the remainders in their contingent state, the proviso did not necessarily imply an estate tail in him; and it seems very difficult to contend that the testator *intended* to give him more than an estate for life: but the proviso strongly indicated that his issue were designed to take estates tail. "The extent of the proviso to the issue was very strong against their taking in fee; and should it be urged that the implication from that circumstance might possibly have been satisfied, by an estate tail male, in the issue as purchasers; the answer is, that would have been either rejecting the words 'their heirs,' or reducing them by a constructive qualification into 'heirs male,' which would at once have removed the only objection afforded by the circumstances of the case, against the ancestor's taking an estate tail, and have left no argument for the issue male taking by purchase at all." Fearn. C. R. 123. But there seems to have been ground to contend that the issue were intended to take estates in tail general.

of estate which the devise is capable of carrying furnishes a safe criterion for determining the objects intended to be benefited; in a case, too, where the term descriptive of the objects is not only free from ambiguity, but of the most fixed acceptation in law;—that where the superadded words, taken in their natural order, must be operative, or nugatory, according as the principal words are accepted in their proper legal sense or not, so that their effect cannot be known till the sense of the principal words is fixed, those superadded words shall nevertheless be forced into operation before all the rest, and shall first cut down "heirs of the body" to a description of children, and then give those objects of their own creation the fee? There is not throughout the judgment a single expression which can warrant an inference that if this additional ingredient had been thrown in, it would have had the slightest effect upon the minds of the great lawyers by whom the grounds of the judgment were so strongly stated. It is true that Lord Eldon said that "heirs of the body" *might* be controlled, and that this *might* be by the effect of superadded words: but his Lordship must certainly be understood to allude to the settled doctrine that superadded words indicating a different course of descent from that pointed out by the principal words, or words superadded to "heir of the body" in the singular, &c., may turn the principal words into words of purchase, descriptive of the individual *heir* or *heirs*. It would be straining his Lordship's expressions, and imputing to them

a meaning derogatory to his high reputation as a lawyer, to interpret them into an admission that if words of limitation in fee had been engrafted on the words "heirs of the body" in Jesson *v.* Wright, they would have imposed upon these words a sense totally different from that which the decision attributed to them, and have rendered them synonimous with *children.* Lord Eldon expressly said, that he could not admit all the *cases* to be rightly determined; not confining his observation to Doe *v.* Goff. His Lordship was probably unwilling to pronounce extra-judicially a direct censure upon a line of cases which the judgment of reversal in Jesson *v.* Wright, rendered it probable would not be extended.

If any further confirmation of the conclusion that superadded words of limitation in fee, or other words adequate to pass the fee, are not to be regarded, were still wanting, we might derive it from the very sources of those doctrines which have given rise to the notion that such words are capable of influencing the construction. For in Doe *v.* Jesson the Court of King's Bench held the absence of such words to be a circumstance perfectly indifferent; and appeared quite prepared to go the whole length of controlling "heirs of the body" by circumstances importing division, &c. without any words carrying the fee; and in Doe *v.* Goff, that Court decided that under the term "heirs of the body," children were entitled, without determining what estates those children took.

Mr. Fearne, after taking a review of the nature and scope of the rule in Shelley's case, draws the following conclusion. (o)

"This delineation of the rule comprehends two discriminating lines, whose concurrence seem to decide its application: the one is, that the person to claim the inheritance after the ancestor is to claim as heir, &c., that is, *eo nomine*, and under that description, whoever such person may be; and the other, that the effect of the limitation is not confined to the person so first claiming, or his representatives, as such, of any description; but directed equally through all other persons, successively answering the same relative description of heirship general, or special, to the ancestor referred to; and entitling them *eo nomine*, or in that character only. It is evident that the first branch of this distinction will exclude all those cases where the words 'heirs of the body' are by other words of reference or qualification explained, or restrained to the sense of first and other sons, &c., as in Walker v. Snow, (p) Lisle v. Gray, &c.; (q) equally with the cases of marriage articles, and executory trusts, (r) wherein a similar construction has prevailed, as well as all those wherein, on account of words subjoined, the persons to take cannot take as heirs, or by virtue of

(o) Cont. R. 143.
(q) *Supra*, 79.
(p) *Supra*, 79. (n).
(r) *Infra*, Sect. VI. n.

that description *by reason of the distributive direction* (s) *amongst several constituting an heir, or as tenants in common, or in some other mode, irreconcileable with the course of a descent, as in Doe* v. *Laming,* (t) *and others of that sort;* (u) together with those where the description is directed to a *presumptive* heir in the lifetime of the ancestor as in Burchett *v.* Durdant, (v) and others of that class; whilst the latter branch of the distinction excludes all those cases, wherein the import of the word 'heir,' &c. in the singular number, is by annexed words of limitation confined to the first, next, or one individual heir, &c. and his heirs, &c. or to such heir, &c. for life, as in Cheeke *v.* Day, Archer's case, (w) White *v.* Collins, and others of that complexion, as well as those where the words of limitation superadded to the words 'heirs,' &c. denote a different species of heirs from that described by the first words, as in the case put by Anderson (x) in Shelley's case."

It will appear from the passage above cited,

(s) See 1 Ves. jun. 143.

(t) *Supra,* 104.

(u) In Mr. Fearne's time there were no other cases of *that* sort.

(v) *Supra,* i. e. so to as to reduce "heirs" to a mere description of the individual. For "presumptive heir" we should read "heir apparent."

(w) *Supra,* 89, 91. *n.*

(x) As counsel *arguendo.* Lord Thurlow mentions it as the only instance of the kind. *Supra,* 95.

that it is not attributing too much to the judgment of the Lords in Jesson v. Wright, to state that it not only restores the authority of the rules laid down by Mr. Fearne, in days which may now, perhaps, be called "days of yore," (y) for the construction of devises to heirs of the body, but warrants the application of those rules to cases which that writer seems to have considered as excluded from their influence; and establishes this branch of learning on broader and surer grounds than it had hitherto been placed by positive decision, though without any extension of the reason and spirit of the principles so clearly laid down, so anxiously inculcated, and so stubbornly maintained, by the sages and fathers of the law.

The new doctrines seemed to threaten for a time a general breaking up of the ordinary rules of interpretation; for in the language of Pollexfen (z) (which, though it may sound rather harshly and quaintly to a modern ear, is nevertheless good law, and good sense.) "If you can change the word 'heir,' and put in 'son' or 'issue' [*a fortiori*, 'children'] you may make words of limitation to be words of purchase; make a man take by the name of *heir* which is *not* heir. If a man may lay aside some words, and put others in their places, a man may make any thing—any thing." This, perhaps,

(y) Sugd. Vend. 6 Ed. 424. (z) Poll. 587.

may, with reference to the doctrines in question, be interpreted to mean, that if you once reject the plain sense of the words employed by the testator, and substitute a different or opposite sense, upon conjectural grounds; or, in other words, if you discard the principles laid down in Jesson *v.* Wright, and revert to the doctrines propounded in Doe *v.* Jesson; you may make one man's estate another man's estate, and set up, instead of permanent metes and landmarks, something as unsteady as the vane of Westminster Hall, shifting about with every wind of doctrine, "loose on the point of every wavering hour."

The judgment in Jesson *v.* Wright establishes general principles of great importance. It stands as a beacon, guiding those who have to decide upon such cases to the true point of enquiry, and warning them not to stray, beyond the bounds prescribed by the rules of law, in quest of intention, nor bewilder themselves, and those who are bound to follow them, in the maze of "petty distinctions."

Lord Redesdale enforced the necessity of establishing rules, and the importance of upholding them, that those who have to advise may be able to give opinions on titles with safety. He observed that, from the variety and nicety of the distinctions in the cases, it was difficult for a profes-

sional adviser to say what is the estate of a person claiming under a will; that it could not at this day be argued that because a testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled, or overthrown;—that it was dangerous, when words have a fixed legal effect, to suffer them to be controlled, without some clear expression, or necessary implication; that to say that the general intent should over-rule the particular, was not the most accurate expression of the principle of decision: but that the rule was, that technical words should have their legal effect, unless from subsequent inconsistent words it was *very clear* that the testator meant otherwise; and that those who have to decide upon such cases ought not to rely on *petty distinctions*, which only mislead parties; but look to the *words* used in the will.

Lord Eldon said that the words "heirs of the body" meant *primâ facie* all descendants; and that it was a RULE OF LAW, *that all descendants should take under those words, unless clearly qualified*, and restricted by other words, so as to give them a more limited sense; that he could not admit that all the *cases* cited had been well decided, but that it was hardly to be expected, that judges should agree in the decision of all those cases, for the mind is overpowered by their multitude, and the

subtlety of the distinctions between them; that the decision ought to accord with former authorities, if possible, but that *at all events they must adhere to the established rules of legal construction;* that in order to cut down the estate tail, created by the words "heirs of the body," it was absolutely necessary that an intent should be found to control, and alter it, *as clear as the intent expressed by those words;* and that it was more important to maintain the rules of law, than to provide against the hardships of particular cases.

The same deference to authority, the same anxiety to maintain established principles, and promote uniformity of decision, has marked the judgments of Lord Eldon from the earliest period of his judicial life. In the case of Thompson *v.* Lawley (*a*) his Lordship observed, that whether the rule then in question was wisely adopted or not, it was unnecessary to determine: but a general rule having once been established, he had rather consent pointedly, and avowedly, to contradict that rule in terms, *than to acknowledge it in words, and deny it in effect,* by raising distinctions, which in fact made it impossible for any man to decide, in any particular case, what was the legal construction of a will, as to the point submitted to him, till he had obtained the authority of a court of law, in a

(*a*) 2 Bos. and Pull. 303.

judgment upon the will, for the opinion which he gave. (*b*)

When we see a mind capable of grasping the whole compass of our jurisprudence submit itself to a patient research into cases, descending to a critical examination of their most minute circumstances, and not unfrequently deducing the true principle of decision from sources unexplored by the diligence of the bar; when we observe the result in a system of equity, which, by respecting the authority of settled rules, and by the cautious introduction of such principles only as are in perfect accordance with those rules, at once promotes the ends of justice, and advances the character of the law as a science; no judge can be allowed to discard the maxim "*stare decisis*" as unworthy of an enlarged intellect, or to question the wisdom of a discreet adherence to it. To expect from any judge that every individual case should be determined on its true grounds, would be to exact more than human nature can achieve: but if the mass of his decisions tend to establish sound principles, and to render classification easy; if he lean so far to the circumstances of the particular case as is consistent with a just regard to the integrity of esta-

(*b*) These observations appear to have been occasioned by what fell from Lord Kenyon in Lane v. Lord Stanhope, 6 T. R. 345. where his Lordship seems to have treated the rule in Rose v. Bartlett, Cro. Car. 292. rather slightingly.

blished rules of law, and no further; if, at the close of a long judicial life, the ancient land-marks of property are found not only unremoved, but redeemed from the rude assaults of sacrilegious hands, and more securely fenced in from the injuries of time and accident;—of such a judge it may be truly said, *Omne tulit punctum.*

SECTION VI.

Of the inflexibility of the Rule in Shelley's case.

Discussion of the opinions of eminent Lawyers concerning the nature and tendency of the Rule.

"The cases (says Mr. Fearne) as well as principles, tell us, the controlling *rule of construction* in wills is the intention, expressed, or clearly implied. To contradict this would, indeed, be a mockery, a denial of the import of the word 'will.' On this broad ground some have driven the rule in question (*i. e.* the rule in Shelley's case) to a distance, that would in effect reduce it to no rule at all, by subjecting it to the control of any expression not perfectly reconcileable with a positive *intention* of its admission; while others have, with a rigid degree of legal sternness, insisted on an *inflexible adherence to the rule without regard to any implicative contravention of its effect.* It is obvious (continues this writer) that neither of these doctrines is reconcileable with that train of

decision, which must, I conceive, be held to have pronounced the law on this point. These decisions (if I do not mistake them) neither bend the rule to, nor support it against, every expression or manifest indication of contrary intention. The one would be absolutely discarding it as a *rule of construction* in wills; the other would be rendering the legal effect of certain technical words in the very first line of a will irrevocable through the whole sequel of it. The amphibolous tendency of cases and principles seems to conspire in the production of a question, the solution of which may, by professional gentlemen, be truly termed the *hic labor*, the *hoc opus*. To attempt it with precision seems vain, until we can reduce all possible expressions, or indications of *intention*, to certain classes, or degrees of relative force. Then indeed might we ascertain, on a standard scale, what degrees of express or implicative indications of *intention* are below, and what above the controlling index of the rule. Whilst that is out of our reach, what can we do more than resort to some general inferences afforded by the comparison of the several cases, in which the *intention has been allowed to control the rule?*' (*a*)

When our conclusions are found to be at variance with those of a writer, who applied to the partial solution of this problem powers and attainments of the

(*a*) Fearne, C. R. 142.

highest order, we cannot be altogether without apprehension that some strong point in his positions has escaped our observation, or that some link in the chain of our own reasoning is defective; more especially when the difference between us involves the essential nature and properties of the rule itself.

In no sense can the intention with propriety be termed the controlling rule of construction even in wills. In deeds, the law prescribes certain modes and forms of communicating certain ideas, and these must be strictly observed. In wills, greater freedom of expression is permitted;—whether wisely or not has been doubted by some of the highest legal authorities. (*b*) If any doubt upon this point should still linger in the mind of any one, it may be dispelled by even a cursory survey (and indeed few can hope to take more than a cursory survey) of the reported decisions upon wills. There he may contemplate the human mind, as affected by prejudice, opinion, modes of thinking, habits of edu-

(*b*) "Had there not been such a current of authorities as we find in the books since the passing of the Statute of Wills, on the construction of wills, to further, as it has been called, the intention of devisors, perhaps it would have been better that the same strict words had been required in testamentary dispositions of land as in those by deed, because then the language of passing estates would have been so familiar that few questions would have arisen on wills." *Per* Lord Kenyon, 5 T. R. 561. "The question upon the construction of wills whether a person takes an estate for life or in tail, has been very much agitated; and yet remains so much undetermined, that

cation, or by the skyey influences; and if his progress in law should be slow, he may at least be advancing in philosophy. Now decision wears a stern legal aspect; the intention is probable, is obvious, but the letter will not bear it out—*voluit sed non dixit*. A few, and but a few pages onward, another, nay perhaps the very same, judicial brow unbends its rigid features, and frolics in conjecture.(*c*) Intention, the law of the instrument, warrants this excursive mood, and *dulce est desipere in loco*. Though this evil cannot now be remedied, its progress may be checked by clinging to the little of certainty that yet remains; to those rules of law which, as well in wills as in deeds, control in some instances

counsel must still find it very difficult to give an opinion that can be depended upon. And I think it would have been of great service to the public, and tended to render property less precarious and uncertain, if the legal construction of words in a will had never been departed from; for it must be much better that every testator's intent should be subservient to the rules of law, than that the law should be subservient to the parties' intent." *Per* Wilmot, Notes 398.

(*c*) "If courts either of law or equity, (in both of which the rules of interpretation must be always the same) if these or either of them should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation. A civilian of some eminence, Mantica, has written a learned treatise on their law *De Conjecturis ultimarum Voluntatum*: but I hope never to see such a title in the law of England." Mr. Justice Blackstone's argument in Perrin *v.* Blake, Harg. Tracts. 495. (Note, in 6 Cruis. Dig. 160. the former part of this passage is cited as Mr. Hargrave's own observation.)

the intention of the party, and oblige the law of the instrument to conform to the law of the land.

The conclusions to be drawn from a consideration of the terms in which the rule is laid down, and of the adjudged cases in which it has been applied, or discussed, appear, in my humble conception, to be these:—that it is a rule to which the courts are bound inflexibly to adhere, without regard to any express or implicative contravention of its effect; that it is to be discarded as a rule of *construction* in wills; that no case can be found in the books in which the intention has been allowed to control the rule; that the only possible mode of reconciling the rule itself, or the determinations upon it, with that degree of freedom which the law extends to testamentary dispositions, is to consider the rule as destructive of intention, and not as prescribing certain modes of communicating the intention; and that to represent it in any other light would indeed be to render it a mockery, a denial of the import of the term "will."

In the paragraph above transcribed, Mr. Fearne appears anxious to steer a sort of middle course, between the oppugners and defenders of the rule, considered as a rule applicable to the construction of devises; to temporize between two parties, who appear to have agreed in nothing but a determination to invest the rule with imaginary difficulties and terrors, and who exhausted their zeal and talents, the one in sustaining, and the other in destroying,

a fictitious *constructive* character foreign to the nature and object of the rule.

So far as our enquiries are directed to ascertain the intention of the testator, with regard to the admission or exclusion of the rule, they must, in every case, be very brief. The nature of the disposition which invites the application of the rule, repels the intention to admit it. The testator cannot, indeed, be supposed to entertain a thought upon the subject of a rule, of whose very existence he is not presumed to be apprised.

The decisions to which Mr. Fearne alludes as not supporting the rule against every expression or manifest indication of contrary intent, and which have been noticed towards the close of the last section, (*a*) seem to prove nothing more than that the words "heirs of the body" are, whether found in connection with an estate of freehold in the ancestor or not, capable of restriction, qualification, or explanation, a position which the rule in Shelley's case does not assume to contradict; and the question to be put upon each of those cases (a question precedent to any reference to the rule) is whether these words were rightly interpreted according to the ordinary canons of construction or not. In some of those cases, the *several* limitations requisite to call the rule into action did not exist; and in all the rest there were circumstances which

(*a*) *Supra*, 187.

placed the devise beyond the purview of the rule. Those decisions therefore, leave the rule wholly untouched and unaffected.

There has never been any direct infraction of the rule. In order to constitute a departure from the rule, the courts must go the length of holding that a limitation to the heirs, or heirs of the body, preceded by an estate of freehold of the same quality in the ancestor, entitles the heirs to take, as such, originally in their own right, with the same capacity of transmission, and in the same manner, as if an estate of freehold of a different quality only, or no estate of freehold, in the ancestor, had preceded the limitation to them. But the courts have uniformly denied *that* operation to the devise, nor has any judicial dictum distinctly asserted that such an effect can be produced by the clearest manifestation of intention; and if it cannot, it seems to follow, by a necessary consequence, that the rule is inflexible.

In every case to which the rule is properly applicable, the intention, as expressed, requires that the heirs shall take in the mode above specified, independently of the ancestor; the rule requires that they shall take derivatively through him. Where there is a simple gift to one for life, remainder to the heirs of his body, it is agreed on all hands that the rule must be applied: but where any circumstance, as a limitation to trustees to pre-

serve contingent remainders, (*d*) has been superadded, which may be deemed to mark more strongly the intention that the *heirs* shall be *in* by purchase, the great struggle has been, whether, seeing that the testator evinces such anxiety that the limitation to the heirs shall not attach in the ancestor, but operate as a remainder to them by purchase, and that the heirs in the character of heirs cannot so succeed to the inheritance; the gift to them shall be construed a description of individual objects, as first and other sons, &c.; so that the real difference between those who in such cases hold the first taker to be tenant in tail, and those who hold him to be merely tenant for life, seems to resolve itself into this:—the former interpret the words of the will without regard to the legal consequence; the latter strain and torture them with a design to avert that consequence; each party thereby violating the express intention: but while the one applies the ordinary rules of interpretation, which unavoidably let in the rule of law, the other rejects both. So, where the limitation to the heirs is blended with a direction to take as joint-tenants, or tenants in common, or with other expressions irreconcileable with *their* taking either by purchase or descent; the dispute has been whether the repugnant expressions shall or shall not be rejected; or, in other words, whether

(*d*) Coulson *v.* Coulson, 2 Atk. 246. Hodgson *v.* Ambrose, Dougl. 337. Duncomb *v.* Duncomb, 3 Lev. 437.

the sense of the word "heirs," and consequently the commonly received rules applicable to the construction of wills, shall be violated or maintained. But if no rule of law had said that the heirs as filling that character shall not be *in* by purchase, the ancestor taking an estate of freehold, it is probable that the courts would not in these cases have struggled with the plain meaning of the words, but have allowed the ordinary rules of construction to determine the operation of the devise, without regard to the estate in the ancestor, which seems to have no other attractive virtue than is communicated to it by the rule.

In this point of view, therefore, the rule is an inflexible rule of law, which no court of judicature has ever attempted to control.

Lord Northington, however, in the judgment delivered by him in the case of Austin *v.* Taylor, (*e*) made these observations;—"the determinations in Duncomb *v.* Duncomb (*f*) and Coulson *v.* Coulson, (*g*) were said to be contrary to the intent of the testator, from the necessity of the law, which had imposed a rule, that where an estate for life was created, and a limitation to the heirs of the body, those words must be taken as words of limitation, though the testator's intent was contrary. I said,

(*e*) 1 Eden 361. (From Lord Northington's own note.)
(*f*) *Supra*, 202. *n.* (*g*) *Ibid.*

I knew no such rule with respect to *wills*; for that it was a maxim in law and equity, founded in obvious and everlasting good sense, that every man may (being supposed *inops consilii* at the time of making his will) by any words whatsoever, settle and devise his estate according to his intent, if that intent be agreeable to law. And, therefore, there must be a better ground than mere authority for making an express tenant for life tenant in tail, with a capacity to defeat the limitation to the heirs of his body. For in the case of Duncomb *v.* Duncomb, where the limitation was for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of tenant for life, though there were no contingent remainders to be supported unless the latter words were taken as words of purchase, yet it does not appear to have been so much as questioned, whether the word 'heirs' was a word of limitation or of purchase. The reason, therefore, why those words have been taken in these cases as words of limitation, and not of purchase, seems to me to have been, that *the law having fixed that meaning to the words*, Courts of justice could not say that the testator did not mean them to be accepted in that sense, but as words of purchase, *unless there are other expressions* made use of in the will, plainly evidencing that intent. There can be *no doubt* but that if a devise were made 'to on in trust for J. S. for life, and after his death to the heirs of his body, *such heirs to take as purchasers*,' courts of law and

equity must interpret the word 'heirs' in a sense contrary to their obvious meaning, and not as words of limitation to the heirs of the body of tenant for life." (h)

And in King v. Burchell (i) his Lordship, in answer to an argument that *issue* technically is a word of purchase, and that words of limitation being added the devise was to the issue of J. H. after his death in fee, said, "There is no technical word in a will."

But in Wright v. Pearson (k) the same learned Judge remarked, that "Testators attempt to *annex qualities to estates which the law will not allow of*; they will give estates for life, meaning that they shall have descendible qualities with respect to the succession, wishing them to have restrictive qualities with respect to the first taker."

We should with difficulty, perhaps, be induced to believe that these passages were the offspring of

(h) "If the testator's intent had been ever so apparent, it must be agreeable to the rules of law. Suppose one devises to A. and the heirs of his body, and says, I declare that the heirs of the body of A. shall take by purchase,—can the intent be more manifest and express? And yet A. shall have an estate tail, for the testator shall not be permitted to control the legal operation of the words." *Per* Wilmot. Not. 403.

(i) 1 Eden 431.

(k) 1 Eden 127.

can be shewn, clearly demonstrative of a contrary intent."

When we reflect that these observations were called forth in the discussion of a rule, by which no decided case had been solely governed, but which stood in a great measure on the authority of the above resolution, and which was confessedly subservient to intention, (for the rule does not, like the rule in Shelley's case, involve, in its very terms, a contradiction of the testator's express intention) (q) it will appear with what force they

(q) Where a testator, having both freehold and leasehold lands, devises all his lands to A., and all his personal estate to B., the leasehold lands answer to both descriptions; the balance of intention, therefore, is even, and the rule turns the scale. But the rule assumes that the description under which the personalty passes is the apter description of the leasehold; and in the case of a simple devise of the testator's lands, without any bequest of personal estate, the same principle says that this is properly a description of freehold lands only; and that if there are freeholds to satisfy it, the presumption is against an intention to pass the leaseholds. Before the act of 55 Geo. 3. c. 192. which does away with the necessity of a surrender of copyholds to the uses of a will, where a testator seised of freehold and copyhold lands, there being no surrender of the copyholds, devised all his lands or all his real estate generally, without mentioning copyholds, to his wife or child, the words were considered as satisfied by the freeholds; and equity refused to supply a surrender of the copyholds. But the same words were held a sufficient description of copyholds, if there were no freeholds to answer the devise, or if the testator having both freeholds and copyholds, had surrendered the copyholds. 2 Ves. 165. Bull's Supp. 315. Yet there is, perhaps, "no striking force" in this doctrine.

apply to a certain class of cases, beginning with Doe v. Laming, and ending (let us hope) with Doe v. Wright, in which it is scarcely possible not to perceive that the decision, if not solely induced, was mainly influenced, by the cheap estimation in which a rule of law of the highest antiquity, and most positive institution, was held.

Although the authority of Lord Northington upon points of this nature must be considerably shaken by the language of the Court in Thompson v. Lawley, and though his Lordship's own dicta appear to range themselves on opposite sides; yet, as the passages above transcribed seem to have been the result of mature deliberation, and as the precise case put by his Lordship is calculated to develope the real character and tendency of the rule, and has been the subject of much acute and learned speculation, these dicta demand some further consideration; more especially as we have seen that since the days of Mr. Fearne and Mr. Hargrave, some judicial inroads have been made upon the province of the rule, which, if they do not directly question its sovereignty, certainly tend to circumscribe its dominion. The modern cases will scarcely permit us to join with the latter gentleman, in attributing to a rule, which has thus tamely suffered its ancient bounds to be invaded, that impatience of control, and thirst for undivided empire, which, if the rule could speak, would

induce it to exclaim, "AUT CÆSAR, AUT NULLUS." (r) These decisions would lead us rather to compare its state, (if it were allowable to indulge in such bold figures) with that of Cæsar's great competitor. A more fortunate and favoured candidate for empire has sprung up, under the name of Intention. This formidable rival has already passed the Rubicon; and the rule, bending beneath the weight of years, and trusting too implicitly to its former authority, is in danger of being quickly reduced, in the unequal contest, to yield up all the honours and distinctions accumulated upon it by the lapse of centuries, and by the talents and industry of the great names with which it stands associated, to the absolute discretion of the new dictator.

Nec coiere pares: alter vergentibus annis
In senium, longoque togæ tranquillior usu
Dedidicit jam pace ducem; famæque petitor
Multa dare in vulgus. * * * *
Nec reparare novas vires, multumque priori
Credere fortunæ. Stat magni nominis umbra.
Qualis frugifero quercus sublimis in agro,
Exuvias veteres populi, sacrataque gestans
Dona ducum. * * * * *
* * * * Sed non in Cæsare tantum
Nomen erat, nec fama ducis, sed *nescia virtus*
Stare loco. * * * * * *
* * * *guadensque viam fecisse ruinâ.*
Phar. lib. 1.

It is not too late, however, to repel the attack, and establish the authority of the rule on a sure

(r) Harg. Tracts. 574.

foundation. This, it is conceived, would be in a great measure accomplished by demonstrating the impotency of the express declaration in the case put by Lord Northington. The following observations may perhaps suffice to shew, that his Lordship's reasoning upon the rule is at least open to some considerable doubts.

The rule puts a case of intention. The very terms in which it is laid down seem to presuppose and require a particular estate of freehold in the ancestor, and a remainder to the heirs *intentionally* as purchasers, whereon the rule may operate. The concurrence of the circumstances, which meet in the case put by Lord Northington, is absolutely necessary to call the rule into operation. The case so put is the very case at which the rule is pointed.

It would be treating the rule as designed to sport with the intention of testators, to contend that the rule, as applicable to devises, expresses nothing more, than that the words "heirs of the body," preceded by an estate of freehold in the ancestor, are *primâ facie* words of limitation; that in such cases the law has affixed to the words this primary signification, which, however, must yield to an intent manifested by *other* expressions to use the words in question as words of purchase. To adopt this notion would be to stultify the law. For if we admit that "the nature of every testamentary

disposition, intrinsically and necessarily implies all that can be expressed in any annexed declaration;" (s) and that a devise to one for his life, and after his decease to the heirs of his body, (not to mention devises for life *only*, &c. and cases of interposed limitations to trustees to support contingent remainders, where, unless the limitation to the heirs operates as a contingent remainder, there is no remainder to be supported) amounts in itself to a clear expression of an intent that the ulterior limitation shall first attach in the heirs, as an original gift to them; it follows that the rule is directed against an express intention of the testator; and we are left to refer the rule either to some ground or principle of policy which will not permit such an intent to take effect at all, but substitutes a different operation; or to an arbitrary and capricious humour, which, in this particular instance, refuses effect only to certain *modes* and *forms* of expressing the intent, though such modes and forms be the most apt and proper that could be devised.

As every judge *must* apply the rule against the express intention, so far as it is to be collected from the operative words of the devise, it is surely more consistent with "obvious and everlasting good sense," by applying it to every possible mode of expressing the same intention, to rescue the law from a conclusion so derogatory to its character,

(s) Fearn. C. R. 139

as a rational science, as that upon which we must be forced, if every testator be permitted to decide whether the rule shall or shall not apply to devises falling within its literal terms. The short answer to the arguments in favour of the express declaration is, that a rule of law has affixed to the combined effect of the two limitations the sense of an estate tail in the ancestor; and (to use the emphatic language of Lord Thurlow, (t)) "the testator cannot change the sense of the law." Is not the declaration in effect a mere reiteration of the testator's intent, that the limitation to the heirs shall operate contrary to the rule of law?

If by "no technical word" in the last cited dictum of Lord Northington, we are to understand no word to which a certain idea is, by legal intendment, so inseparably annexed, that it cannot be made to stand in a will for the sign of any other idea, we should strike at the very existence of the right of testamentary disposition, if we were not to admit that there neither is, nor can be, any such word. But if it be meant that some words, even in a will, have not a more fixed, ascertained, and appropriate sense, and are not less flexible and ductile, requiring a more forcible indication of intention to divert them from their ordinary meaning, than other words;—that, for example, the words "heirs of the body" have not a more deter-

(t) 1 Bro. C. C. 218.

minate import, as descriptive of the line of succession to descendible estates than the word "issue," (u) we cannot admit the dictum to this extent, without reducing testamentary dispositions to one common level in point of expression, and denying to testators the power, which language confers on mankind at large, of communicating any given idea with different degrees of force and precision, by the use of different terms. Nor can we be said to retract our previous admission, when we

(u) The distinction between "issue" and "heirs of the body" seems to consist in this;—that "issue," at any given period, includes indiscriminately all the descendants male and female of every degree then in existence; whereas "heirs of the body," at any given period, describes only such of the issue as then fall within the line of inheritable succession. In construing "issue" to be equivalent to "heirs of the body" acting as words of limitation, we restrain its natural import indefinitely, and superinduce the character of heir, subjecting it to the canons of descent. In construing it to be a word of purchase descriptive of issue in the first degree, we also restrain, but do not, as in the other case, essentially alter, its natural import. "Issue," in its proper and most comprehensive sense, is incapable of legal operation; for all the issue from time to time in being cannot succeed together. We are obliged, therefore, to impose upon it a restricted or qualified meaning of some sort; and it is said to be an ambiguous word, because that meaning must be collected from other expressions in the will. It may be restrained to issue of any degree within the line of perpetuity; and as in so restricting it we do not entirely depart from its natural sense, indications less strong than the law requires to explain "heirs of the body" will suffice. If not thus restrained, we construe it as synonimous with "heirs of the body," since there is no other mode in which it can legally operate.

urge the futility of an express declaration that the heirs shall take as purchasers. On the contrary we thereby affirm that the testator *may*, and *does* affix to the words "heirs of the body" the idea of objects taking in their own right, with a capacity of transmission to the heirs of the body, as such, of the ancestor; for this very idea constitutes one of the two circumstances which must concur, in order to bring the case within the operation of the rule; yet the rule is supposed to be repelled because the testator has clenched by a supperadded declaration that intention, which is one of the magnets that attract it.

The language of Lord Northington on this head stands directly opposed to what fell from a considerable authority in a late case. "I shall particularly mention (said Sir W. Grant) (*x*) only one case, for the *purpose of shewing with what difficulty technical words, even in a will,* are diverted from their appropriate meaning, although the intention of the testator seems obviously to require that they should not be applied to the person who properly answers the description. The case I mean is that of Doe on the demise of Bailey *v.* Pugh, Butl. Fearn. C. R. App. 3 Bro. P. C. Toml. Ed. The testator said, 'As to my real estates, after the decease of my wife, I give and devise to the eldest son of my son begotten, or to be begotten, all my

(*x*) 2 Mer. 348.

estates in London and Middlesex for his life; to the second son all my estates in the county of Hertford for his life, subject to pay all the charges of a man I have appointed to look after them, keep them in good repair, &c. and so in the same manner to all the sons my son may have. If but one son, then all the estates to him for his life, and for want of heirs in him, to the right heirs of me the testator for ever, *my son excepted*; it being my will he shall have no part in my estate either real or personal.' The testator left this son and three daughters. The son died without issue; and then the question arose, who was to take under this devise, 'to his right heirs, his son excepted.' The daughters contended that they must be the *personæ designatæ*; for that the son, who was the proper heir, was plainly and manifestly excluded, not only by the intention, but by the express words. And the Court of King's Bench were of that opinion; for they held that the words were to be interpreted as if the testator had said 'those who would be my right heirs if my son were dead.' The case, however, was sent to the House of Lords upon a writ of error; and the Chief Baron having delivered the unanimous opinion of the judges present, that no person took any estate under the will by way of devise and purchase, the judgment of the Court of King's Bench was reversed."

With respect to the technical sense of the words

heirs of the body, it seems inaccurate to consider them as carrying in *themselves* any technical sense, in contra-distinction to their use and acceptation in common parlance. (a) They suggest indeed to the legal mind a more distinct and perfect idea, including all the qualities and incidents of inheritable succession, as regulated by law: but in other respects their legal and vulgar signification appear to be the same. Their technical *effect* as words of limitation, or of purchase, depends on the circumstances under which they are found, whether in association with an estate of freehold of the same quality in the ancestor or not. But the existence or nonexistence of that circumstance cannot in any degree affect the interpretation of the words themselves. The result so painful to the advocates of liberal construction, is not produced by the rigid unbending technicality of the word "heirs;" the stubborn texture of the particular estate of freehold in the ancestor equally resists their progress, and ought to bear at least an equal share of the odium. If that estate could be made to change its nature from legal to equitable, or dwindle down to a chattel interest; the heirs would be *in* as purchasers, and the victory over the rule be complete. If either the ancestor or the heirs must be "pushed from their stools,"—is not the particular estate of freehold a fitter sacrifice than the inheritance?

(a) See 1 T. R. 597.

It cannot be fairly alleged that the rule interferes, in any degree, either with the right of testators to express their intention in whatever phrase they please, or with that latitude of exposition which is claimed by courts of judicature as conservators of such right. The rule does not speak the word "heirs" *abstractedly*;—it does not mean to insinuate that there is any magic in the word "heirs;" it only speaks of the *two* limitations, to one for life, to his heirs the inheritance; (*y*) it imposes no arbitrary sense upon any particular expressions; it leaves to the testator and the court, as fully and freely as if the rule had never been introduced, the privilege of fixing and expounding the meaning of every word in the devise; keeping aloof till the result of the enquiry, which it presupposes, as to the testator's intention is known, and then founding its application solely on the basis of that intention.

On the other hand, the doctrine which we are combating, while it spurns the notion of a technical word in a will, supposes that there are certain words to which "the law has fixed a meaning" contrary to, and incapable of being repelled by, the plain intention of the *several* limitations. This doctrine assumes that the rule had its origin in a design to abridge the right allowed to every testator, and said to be founded "on obvious and everlast-

(*y*) *Per* Yates, J., Perrin v. Blake, 1 Coll. J. 312.

ing good sense, of clothing his ideas in whatever language he may think fit; nay, in a perverse determination to frustrate the most apt and direct rule of expressing his will, in order to force him upon explanatory devices, and oblige him to incur the risk of obscuring his meaning by a redundancy of words. Is this consistent with the indulgent spirit of the law, on which the argument mainly rests, towards the freedom of testamentary disposition?

If this absurdity be the necessary consequence of receiving the rule in the sense contended for by Lord Northington, we shall the more readily reconcile ourselves to the conclusion, that the real aim of the rule is equally directed against every possible mode of expressing an intent to constitute the heirs of the ancestor, as such, purchasers, in the cases under consideration.

The law either can or cannot see the intent, apparent to every extra-judicial discernment on the face of the *several* gifts to the ancestor, and the heirs, to constitute the latter purchasers. If it can see the intent, and such intent be capable of legal effect,—why, in the name of obvious and everlasting good sense, not effectuate it, without requiring its confirmation by other expressions? If it cannot,—how is the superadded declaration, to help? For then, in the eye of the law, it would be a declaration tacked to an estate tail, that the

issue in tail shall take as purchasers; and, as such, would be repugnant and void.

Lord Northington cautiously avoids any allusion to the precise mode in which the limitation to the heirs must, in obedience to the express declaration, be held to take effect. The arguments which have been submitted to the reader assume that his Lordship conceived that the heirs ought to take in the character of heirs, and with the transmissible quality of heirship, but distinctly from the ancestor. In a subsequent part of this section, we shall enquire whether there is any other mode in which, consistently with the established rules of construction, the limitation to the heirs could be held to operate as an independent remainder.

But assuming Lord Northington to mean that in the case put by him the word "heirs" must be understood in the sense of first and other sons &c. the same arguments would still apply; for how does the superadded declaration impress the words with this signification? If the limitation to the heirs has this import,—why refuse it effect in the absence of a superadded declaration? But if that limitation points at heirs as such, and not at objects of a particular designation,—can it be contended that the superadded declaration that "such heirs" shall take by purchase operates to change the word "heirs" into first and other sons &c.?

Some observations which fell from Lord Hard-

wicke in Bagshaw *v.* Spencer, (z) appear to be equally questionable. "I admit (said his Lordship) the general principle that the law will not suffer a man to create limitations contrary to its own rules. But the true application of this principle is to the nature and operation of the estates intended to be created by such limitations, and not to the construction of the words. I will not say that this principle has never been applied to the construction of some particular technical words, to which the law has fixed a certain, appropriate, invariable sense: but even then it has been applied unskilfully, and without proper distinction. The true meaning of the principle is what I have here laid down; therefore the law will not suffer a man to create a perpetuity by a will, any more than by a deed; nor to put the freehold of land in abeyance; nor to limit a fee upon an absolute fee simple; nor to make a chattel descendible to heirs generally. This arises from a want of power in the testator: but in the case in question there is no want of power; for there can be no doubt that the testator might devise his lands for such estates for life, and with such contingent remainders, as are contended for by the defendants. The *only* objection is, that he has used improper words, which the law will not allow to have that operation, notwithstanding his intention is plain. Is the objection any more than that the testator has used words inapt and

(z) 1 Coll. Jur. 388.

improper to create contingent remainders. But does not the fundamental rule of construction say, that *if* the intention appears, the law will expound and mould those inapt and improper words in such a sense as will serve his intention, which cannot be done here without construing *heirs of the body* as words of purchase, descriptive of the *sons and daughters of the first taker and their issue* (*i. e.* in a course of strict settlement.) However it is still urged, that the law has affixed so peculiar a sense to the words *heirs of the body* that they can be nothing but words of limitation, according to Brett and Rigden's case, (*a*) and Shelley's case, and not words of purchase." It must excite surprise that so great a mind as Lord Hardwicke's should so far have overlooked the ordinary rules of construction as to suppose that a remainder to the *heirs of the body*, merely because it assumes to give estates by purchase, and because trustees are interposed to preserve contingent remainders, is equivalent to limitations to first and other sons &c. in strict settlement.

The rule of law is justly represented by his Lordship as applicable to the nature and operation of the estates intended to be created by the limitations, and not to the construction of the words "heirs of the body," to which the law has certainly not affixed so peculiar a sense as to prevent their operating as a designation of particular persons, where

(*a*) Plowd. Com. 340.

the intention manifestly requires that construction. In this respect his Lordship viewed the rule in a different light from Lord Northington.

The real objection to Lord Hardwicke's construction of the devise in Bagshaw *v.* Spencer was, not merely that the words were inapt and improper to create limitations in strict settlement, but that they did not communicate any intention to create them; and were in fact apt and proper to communicate a different intention; — an intention to limit the inheritance to the heirs *ea nomine*. It may be collected from the judgment delivered by Lord Hardwicke in this case, and particularly from the expressions of dissatisfaction (*a*) with which he mentions Coulson *v.* Coulson, that he conceived a *legal* limitation to the heirs, preceded by a legal freehold in the ancestor, and by a limitation to trustees during his life to preserve contingent remainders, to be equally susceptible of the construction of a strict settlement; and indeed it was evident that unless courts of law could be induced to adopt that construction, the consequence of his Lordship's decision must have been the setting up of one rule of property in equity, and another at law.

It seems impossible to reduce the application of the rule within any definite bounds, or to form such distinct notions concerning it, as will prevent

(*a*) 1 Coll. Jur. 392.

a perpetual fluctuation of opinion and decision, as legal strictness and liberal policy alternate on the bench, without previously fixing the rank and authority of the rule itself; without deciding whether it is properly classed by Mr. Justice Blackstone among those rules which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law, deduced by legal reasoning from some or other of those great fundamental principles, being of a more flexible nature, and admitting of many exceptions; or is justly characterized by Mr. Hargrave (*b*) as a policy of law, to prevent the mischiefs that would arise from a commixture of descent and purchase, and which leaves nothing to intention, but is above all exception whatever; or whether it does not in fact hold a middle rank between mere rules of construction, and principles emanating from our juridical polity, as a rule imposed upon the law by the exigencies of peculiar times and circumstances, which ceased with the feudal tenures, and as dictated rather by their contracted policy, than generated by the freer spirit of our legal system. Considered either as a mere technical rule, or as founded in a principle of legal policy, we shall have great difficulty in reconciling it with the doctrine in the books: but, viewed as a rule of tenure, it will appear consistent and intelligible; and Mr. Hargrave's conclusion that it leaves nothing to intention, will still be correct.

(*b*) Harg. Tracts. 502.

Mr. Justice Blackstone, in the well known argument delivered by him in Perrin v. Blake, (b) professes to clear the principles on which he founds his opinion, by distinguishing rules of property into three classes. 1. Rules of an essential, permanent, and substantial kind, which may justly be considered as the indelible landmarks of property, irrevocably established by the well weighed policy of the law, which have stood the test of ages, and which cannot be exceeded or transgressed by any intention of the testator, be it ever so clear and manifest; such as, that every tenant in fee simple, or fee tail, shall have the power of alienating; that no disposition shall be allowed, which, in its consequence, tends to a perpetuity; (c) that lands shall descend to the eldest son, &c. These, he adds, are fundamental rules of property, founded on great principles of public convenience or necessity. 2. Rules of a more arbitrary, technical, and artificial kind; which are not so sacred as these, being founded on no great principles of legislation, or national policy. Some of these are only rules of interpretation or evidence to ascertain the intention of parties, by annexing parti-

(b) Harg. Tracts 489.

(c) If the learned judge only meant to say that there existed from a very early period a strong disinclination in the Courts to countenance limitations tending to a perpetuity, the position is quite correct: but this general abhorrence of a perpetuity did not constitute, though it has since ripened into, a rule of law, which supposes something fixed and determinate.

cular ideas of property to particular modes of expression. Thus if a man devise freehold land generally, the devisee shall be only tenant for life; and if he devise in like manner a chattel interest, the devisee shall have the total property: a devise to a man and his heirs shall give him the full and absolute dominion; to a man and the heirs of his body a more limited inheritance. 3. Rules which are not to be reckoned among the great fundamental principles of juridical policy: but are mere maxims of positive law, deduced by legal reasoning from some or other of these great fundamental principles; such as, that a man cannot raise a fee simple to his own right heirs by the name of heirs as a purchase; or to bring it home to the case then before the Court, that a devise of lands to a man for his life, and afterwards, in any part of the same will, a devise of the same lands to the heirs of his body, shall constitute an estate tail in the devisee for life. But, (he adds) some of these rules of the *second* and *third* class are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions, whereas those admit of none. For if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to the plain intention of the testator. (*d*) And then, proceeding to discuss the ap-

(*d*) Surely when a man devises to A. for his life, remainder to trustees to preserve contingent remainders, remainder to the

plicability of the rule to the case before the Court, (e) he observes that the true question of intent will

heirs of the body of A., the intention of the testator is clearly and manifestly contrary to the legal import of the words (by which I apprehend we must here understand legal *effect*,) and yet the rule of law does *not* give way to this plain intention of the testator.

(e) The devise upon which the question turned in the great case of Perrin *v.* Blake was in these words:—"And should my wife be ensient with child at any time hereafter, and it be a female, I bequeath to her 2000*l.* to be paid her at twenty-one, or marriage, and to be maintained out of my estate till her portion becomes payable. And if it be a male, I give and bequeath my estate, both real and personal, equally to be divided between the said infant, and my son J. W., when the said infant shall attain twenty-one. *Item*, And it is my intent and meaning, that none of my children shall sell and dispose of my estate for longer time than his life; and to that intent, I give, devise, and bequeath all the rest and residue of my estate to my son J. W., and the said infant, for and during the term of their natural lives; the remainder to my brother-in-law J. T., and his heirs, for and during the natural lives of my said sons J. W. and the said infant; the remainder to the *heirs of the bodies* of my said son J. W., and the said infant, lawfully begotten, or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law L. G., and his heirs, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters equally to be divided between them. And I declare it to be my will and pleasure that the share and part of every of my said daughters that shall happen to die shall immediately vest in the heirs of her body in manner aforesaid."—The testator left issue J. W., his only son and heir, and the three daughters named in the will. The testator's wife was not ensient at

turn not upon the quantity of interest intended to be given to the ancestor; but upon the nature of his death, or at any time after. The testator was seised in fee of a plantation in Jamaica, of which J. W. conceiving himself to be tenant in tail, made such conveyance as by the laws of Jamaica is equivalent to a recovery here; and afterwards by settlement upon his marriage limited a jointure rent-charge to his wife. J. W. died without issue. The persons claiming under the limitations of the will in favour of the daughters, and the heirs of their bodies, entered, and contested the validity of the jointure on the ground that J. W. was tenant for life only. In order to try the question, two ejectments were brought by the trustees of the jointress in the supreme court of judicature at St. Jago, in Jamaica, which gave judgment against the trustees in both actions. Writs of error were brought on both judgments in the court of appeals and errors in Jamaica, where one of the judgments was reversed, and the other affirmed. Thence there were appeals to the king in council. In one of the causes (for it does not appear how the other was disposed of) the judgment of the court of appeals in Jamaica was reversed, and a new ejectment brought in order that a special verdict might be found. The supreme court, and court of appeals in Jamaica, having given judgment against the trustees, they appealed to the king in council. The cause came on before the privy council but Lord Mansfield being the only law lord present, and not choosing that the question should be decided by his single opinion, it was agreed to take the opinion of the King's Bench in a feigned action of trespass. The case was argued in the King's Bench in Easter Term, 9 Geo. 3, and again in Trinity Term following. Lord Mansfield, C. J., and Aston and Willes, J., held that J. W. took only an estate for life; Yates, J., was of opinion that he took an estate tail. A writ of error was brought in the Exchequer Chamber, where the point was argued several times. The result was a judgment of reversal. Mr. J. Buller observed that the most that could be said of this case was, that as far as it re-

the estate intended to be given to the heirs of his body. If *the testator intended that they should take as purchasers,* (*f*) then the ancestor remained only tenant for life; if he meant that they should take by descent, or had formed no intention about

spected any *rule of law* there were the opinions of six judges against six (*viz.* Lord Mansfield, Aston, and Willes, J., in B. R., and De Grey, C. J., Smythe, B., and Blackstone, J., against Yates, J., in B. R., and Parker, C. B., Adams, B., Gould, J., Perrott, B., and Nares, J.) though, as to the decision of the case, there were the opinions of seven against five; for the opinion of one of the seven (Blackstone, J.) went upon the idea that it did not appear that the testator meant to use the technical words in a different sense from what the law in general imposes upon them. A writ of error was next brought in parliament: but neither party chose to force on a hearing; and at length, after a litigation of above thirty years, this suit ended by a compromise. Harg. Tracts 489. *n.* Dougl. 342, 343. "It seems particular," observes Mr. Hargrave, (Tracts 493. *n.*) "that under any circumstances a lady should not be able to know whether her jointure was good or bad without waiting for upwards of thirty years, and that at last the business should have no decision." The history of this case exhibits, in rather a strong point of view, the mischievous tendency of a departure, not merely from the rules of law, but from the plain meaning of words. All this tedious litigation arose out of a contest whether the word "heirs" should retain its established sense or not.

(*f*) The testator manifestly intends that the heirs shall take originally in their own right; or, in other words, that *they* shall take as *purchasers*. The testator cannot be supposed to know the use and import of the technical term "purchasers:" but when he expressly devises a particular estate of freehold to one object, and the inheritance to other objects, he does not conceive himself to be giving the entire inheritance to the first devisee, with a mere chance of succession to the ulterior devisees.

the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question therefore (observes the learned judge) is,—whether the testator has or has not plainly declared his intent, that the heirs of the body of John Williams shall take an estate by purchase, entirely detached from, and unconnected with, the estate of the ancestor? Or, in other words, whether he meant to put an express negative on the general rule of law, which vests in the person of the ancestor, when tenant of the freehold, an estate that is given to the heirs of his body? But, in order to say this, we must suppose that the testator was apprised of this rule, and *meant an exception to it*, of which there is no evidence. (g) He then enquires what evidence has been usually required to demonstrate such a devious intention; and notices four instances, in which the word "heirs" has been allowed to give estates by pur-

(g) If the testator clearly intend that the effect which would result from the application of the rule shall not take place, he demonstrates an intention to exclude the rule. He says in effect, "I know nothing of the rules of law: but I mean that the devise to the heirs shall not enlarge the estate of the first taker, and if there be any rule of law which interferes with this intention, I wish to exclude that rule." The doctrine advanced by the learned judge would be productive of this absurd consequence, that though the rule is flexible, it would bend only to the intention of such testators as had the good fortune to be conversant with the rule. But what testator, conversant with the rule, would ever frame a devise calculated to raise a question as to the applicability of the rule?

chase, namely,—1. Where the ancestor takes no estate of freehold, as in Mandeville's case. (*h*) 2. Where life estates only are given to the heir, [or heirs (*i*)] as in White *v.* Collins. (*k*) 3. Where heirs are explained to mean *individuals*, as in Burchet *v.* Durdant, (*l*) Lisle *v.* Gray, (*m*) Lawe *v.* Davies, (*n*) Doe *v.* Laming; (*o*) and, 4. Where words of inheritance are grafted upon the word heirs, (and he considers Lisle *v.* Gray, Lawe *v.* Davies, and Doe *v.* Laming, as falling under this head, as well as the other, having words of limitation superadded to the heirs, (*p*) as well as explanatory words.) None of these cases, he says, furnish a precedent for construing "heirs" as a word of purchase in the case then before the Court: but he does not say that other circumstances, shewing a clear and manifest intent, may not warrant the same construction. (*q*)

(*h*) *Infra*, 240. *n*.

(*i*) Pierson *v.* Vickers, *supra*, 114.

(*k*) Com. 289.

(*l*) *Supra*, 104.

(*m*) *Supra*, 79.

(*n*) *Supra*, 81.

(*o*) *Supra*, 85.

(*p*) As to the unimportance of the superadded words, *vide supra*, 56, 80.

(*q*) But none of the cases noticed by the learned judge are properly "exceptions" to the rule. They were all marked by circumstances which placed them out of the letter and reason of the rule. Cases in which the limitation to the ancestor is by one conveyance, and the limitation to the heirs by another, might, with equal propriety, be said to form exceptions to the

We cannot but admire the skill which enabled the learned judge, with an appearance of consistency, to deduce such a conclusion from such premises.

With respect to the learned judge's classification, it may be observed that some of the rules which he places in the first class may, with at least as much propriety, be referred to the second, *et è converso*, so far as regards many of the epithets applied to them. Is not the rule against perpetuities as arbitrary, technical, and artificial, as the rule that a devise of freeholds indefinitely passes only a life estate? It fixes arbitrarily, upon technical reasoning, (*r*) the exact limits; (*viz.* a life or

rule. There is no adjudged case which forms an exception to the rule, unless it be the case put by Anderson in Shelley's case, *supra*, 95.

(*r*) "Why the law disallowed those kinds of limitations (limitations to the issue of persons unborn as purchasers) I will not take upon me to say, because I have never met in the compass of my reading with any reason assigned for it, and I shall not hazard any conjecture of my own; for technical reasons upheld by old repute," &c. *Per* Lord Northington, 1 Eden 416. It may, perhaps, be asked why an executory limitation to a person in *esse* to arise at any period, however remote, should be void? As to A. in fee, and if B. or any of his issue male shall be created an earl, to C. in fee. For the estate is not taken out of commerce, since A. or his heirs, and C. or his heirs, concurring, may at any time sell the estate, so that it is merely a divided ownership. But a substantial ground of objection to these limitations is, that to the end of time the ownership of every person succeeding under the first limitation may continue

lives in being and twenty-one years afterwards, with an allowance for the period of gestation) beyond which the alienation of property cannot be restrained. On the other hand, is not the rule which distinguishes between an indefinite devise of a freehold, and a chattel, the one passing only a life estate, the other the whole interest, founded on a principle of policy as well as the rule against perpetuities? It is founded in the greater consideration attached to the freehold, in the eye of the law, and the favour shewn to the heir; and that favour is, or was in its origin, founded on a great principle of national policy; the same policy from which the right of primogeniture, mentioned under the first class, took its rise. The rule against perpetuities can hardly be said to have stood the test of ages; for in the time of Lord Nottingham, and even of Lord Northington, (s) the limits were far from being clearly defined; and they were not perfectly ascertained up to a very recent period. (t) The rule in Shelley's case is referred to the third

defeasible, and that A. or his heirs alone would never be enabled to convey any portion of interest in any part of the estate for a single hour certain; an effect that does not result from the strictest intail, since the period may, and probably will arrive, when the person or persons succeeding under the intail may transfer an absolute indefeasible fee simple in the entirety, and each alone may so transfer his several part or share.

(s) 1 Eden 411, 418.

(t) "Questions of perpetuity did not arise till the simplicity of the common law gave way to the complication of modern conveyancing." Sugd. Gilb. Introd. xi.

class, as being a maxim of positive law, deduced by legal reasoning, from some or other of "the great fundamental principles of juridical policy;" *viz:* those principles, I presume, which are mentioned under the first class, but which are there termed "great principles of public convenience or necessity," the rules of the second class being stated to be founded on no "great principles of legislation, or national policy."

But with every disposition to receive with deference whatever may have fallen from a writer so deservedly esteemed, and who is rarely wanting in perspicuity, I cannot help thinking, that to divide the rules of property, into such rules as are essential, permanent, substantial, founded on great principles of convenience or necessity; such rules as are arbitrary, technical, artificial, less sacred, and not so founded; and such rules as are maxims of positive law, deduced by legal reasoning from some one or more great fundamental principle or principles; and then to affirm that the rule in Shelley's case is one of the latter sort; is to fill the eye and the ear rather than the mind, and is in truth only "an emphatical mode of saying nothing." The same kind of process would enable every lawyer to exalt or degrade the rule according to his own notions of its rank and influence.

If, however, the mind were to fall into such a train of legal reasoning upon any great principle

or principles of juridical policy as would suggest the necessity, or fitness, of a maxim, to the effect of the rule in Shelley's case,—is it not probable that the same reasoning would lead us to the conclusion that the maxim ought to be something more than a mere precarious form of words, which every testator may abrogate by a few strokes of the pen? It is difficult to conceive that any process of rational deduction, from any known principles of our jurisprudence, could produce a maxim, at once so capricious, arbitrary, and subservient, as one which would destroy the plain intent of a devise to a man for life—remainder to his heirs—if unaccompanied by other words negativing an intent by these distinct limitations to vest the entire inheritance in the ancestor, but allow it effect if so accompanied.

The rules applicable to wills may, perhaps, be considered as divisible into,—I. Rules which assist in ascertaining whether certain ideas are sufficiently communicated by the testator or not; as, 1. Rules of interpretation, which determine the proper force of particular words and phrases, standing unexplained, as "hereditaments" expresses the subject and not the interest, "estate" both. 2. Rules of construction, which prescribe certain methods of reading the will, connecting, detaching, or transposing the different parts, with the view of extracting, as far as possible, a consistent meaning from the whole; as, that the

will must be taken together in order to collect the intention; that no words shall be rejected, if they can stand without doing greater violence to the will in other respects. 3. Rules of exposition, (if they may be so termed) which decide when the application of the preceding rules discloses conflicting intentions, as, that if there be distinct devises of the same estate to two different persons, they shall take (according to the better opinion) in moieties; that the heir at law shall not be disinherited without express words, or necessary implication; that estates shall be held vested rather than contingent; that an estate capable of effect as a remainder shall not operate by way of executory devise. II. Rules which pronounce as to the fitness and admissibility of the intention, which by the foregoing methods is ascertained to be communicated. These are,—1. Such rules as are designed to secure or promote some object of public utility, as the rule against perpetuities. 2. Such as are directed against some particular mischief, less extensively felt; and to this class, I apprehend, we may refer the rule in Shelley's case, to prevent the tenant from defrauding the feudal lord of the valuable fruits of tenure which accrued to him when the heir succeeded to the inheritance by descent.

These rules are all equally sacred, and equally binding on the courts; and though some are more formal than others, and might be departed from

without any immediate danger to the interests of society, yet the forms of the law are said to be the life of the law, and the benefit of an abidance by settled rules must greatly outweigh all the occasional hardships, and inconveniences, which can be thrown into the opposite scale.

Mr. Hargrave, as we have seen, endeavours to establish the rule on the broadest basis of juridical policy; of a policy which, as he contends, exerts its full influence at this day, and has for its object the prevention of those absurd and mischievous consequences which, in his apprehension, would ensue from the admission in the instance of a limitation to the heirs, preceded by an estate of freehold in the ancestor, of that amalgamation of purchase and descent, which, nevertheless, the law has invented, and adopted, where no freehold, or a freehold of a different quality only, is limited to the ancestor. He represents (*a*) the rule to be "a conclusion of law upon certain premises so absolute as not to leave any thing to intention, if those premises really belong to the case; and those premises he insists are, an intention by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such a case the word 'heirs' is used in this its large and proper sense, it is a contradiction of the rule to intend that the remainder to the heirs shall operate by

(*a*) Harg. Tracts, 561.

purchase, and such intent is not lawful. If such be the intent, then he would apply the rule, *even though the party should express in his will that the rule should not be applied, and that the remainder to the heirs of the tenant for life should operate by purchase,* which strong sort of case has not yet occurred in a court of justice, though it certainly has been the subject of private consultation. This is the alternative into which he (Mr. Hargrave) resolves every case arising upon the rule, whether by deed or will, because he doth not concur with Mr. Justice Blackstone, and other supporters of the rule, in considering it as a mere rule of technical construction, or interpretation; as a rule subservient and subordinate to the intention of parties; and therefore as flexible, accommodating, and obedient; and because he confidently believes that the rule is a *policy of law* which leaves nothing to intention, where the premises, to which only it applies, really exist; and consequently that it is of a quality rigid, stubborn, imperious, irresistible, and so indisputable, as to be above all exception whatever."

The expression that the intention to limit a remainder to the heirs by purchase is *unlawful* is perhaps rather too strong if understood in its most extensive sense. This intent forms part of the premises on which Mr. Hargrave founds the application of the rule: the rule supposes the existence of such an intent; and that it might in the absence of any positive rule, assigning another

operation to the two limitations, lawfully take effect. It seems inaccurate to say that if the testator intends the remainder to the heirs to operate by purchase, the rule shall be applied, because such intent is unlawful, since the rule alone renders it incapable of legal effect.

Here we observe that Mr. Hargrave proposes, almost in terms, the very case suggested by Lord Northington; and expresses an opinion decidedly adverse to the doctrine laid down by his Lordship.

Mr. Fearne, in commenting upon the passage above transcribed, observes(*a*) that "Mr. Hargrave expresses himself in terms which may at the first glance be thought to bear against the leading principle in the construction of wills, when he says if the party meant to build a succession of heirs on the estate of the tenant for life, he would apply the rule, even though the party should express in his will that the rule should not be applied; and that the remainder to the heirs of the tenant for life should operate by purchase. But upon examination (says Mr. Fearne) this appears in effect only striking the balance between two incompatible intentions; the one that the whole line of heirs, and those only, shall take, the other that they shall take by purchase."

Mr. Fearne then proceeds to shew that in the

(*a*) Fearn. C. R. 143.

case of heirs general (at least) the limitation to the heirs, if allowed to operate by purchase, would not embrace the whole line of heirs of the ancestor, but might eventually carry the estate to strangers, in defect, or in exclusion, of the heirs of the ancestor; and draws the conclusion, that if the intention be once clear that the succession should go and be confined to all the heirs of the tenant for life, the direction that they shall take by purchase must be rejected for inconsistence, in order to fix the effect of the devise to the intended objects. But he admits that we have instances, as in Mandeville's case, (*u*) of limitations to heirs special vesting by

(*u*) "John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge, and to the heirs of John Mandeville, her late husband, on her body begotten; and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase) and that when he died without issue, Mawde, the daughter, was tenant in tail *as heir of the body of her father, per formam doni*; and the formedon which she brought supposed *quòd post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfatâ Robergiâ per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfatâ Robergiâ per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict.*' And yet in truth the land did not descend unto her from Robert; but because she could have no other writ, it was adjudged to be good. In which case it is to be observed, that albeit, Robert being heir, took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered

purchase, so as to reach all the described heirs of the ancestor that would have taken by descent from the same ancestor; but he maintains that the only instances of such a succession, founded on a fictitious descent from the ancestor, are confined to cases where the ancestor takes no estate of freehold; thence inferring that the law will not admit of an heir special, any more than an heir general, taking the inheritance by purchase, so as to preserve the line of descent from the ancestor referred to, except in cases where the ancestor, to whose heirs the limitation is directed, takes no preceding estate of freehold by the same instrument; and, consequently, that the intended succession cannot be effectuated without an actual descent. This inference, he says, is not encountered by any one judicial decision or opinion to the contrary.

But it is conceived that Mr. Hargrave, when he speaks of an intention to comprehend the whole line of heirs to the tenant for life, and to build a succession upon his preceding estate of freehold, does not contemplate a case in which there is any further or other indication of such an intention than what arises from the force of the *several* gifts to the ancestor and his heirs. It is clear from the

the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and, therefore, when the gift was made, she took nothing but in expectancy, when she became heir *per formam doni*." Co. Litt. 26 *b*.

whole tenor of his Tract that he meant to put the strongest case that could possibly be put, and to submit the rule as regards intention to a decisive test. He meant, therefore, to put the strong case of a devise to A. for life, and after his decease to the heirs or the heirs of the body of A. with a superadded declaration that the rule shall not be applied, but that the remainder to the heirs shall operate by purchase.

If there existed, independently of the rule in Shelley's case, principles inherent in our law of succession which denied the limitation to the heirs, preceded by a freehold in the ancestor, the effect of a remainder by purchase,—how are we to account for the introduction of the rule, or for that negative branch of it which says that the words "heirs, &c." shall not be words of purchase; and which clearly implies the possibility of their operating, consistently with the general principles of law, as words of purchase, in the case contemplated by the rule?

Though a remainder to the heirs general operating by purchase may fall short of reaching the whole line of heirs of the ancestor, *that*, I conceive, would be no ground for vesting the inheritance in the ancestor, if the intention that the heirs should take by purchase were manifest, and the rule were silenced; inasmuch as the intention to be collected from the gift could not in the eye of the law

well be larger than the legal capacity of the gift itself. In fact the consideration that the remainder operating by purchase would not, as Mr. Fearne has shewn, (x) carry the succession through the whole line of heirs general of the ancestor, seems to lead to a conclusion that there is some inaccuracy, in terms at least, in the position laid down by the writers on the rule that an intention to use the word "heirs" as descriptive of all possible heirs or the whole line of heirs of the ancestor, and not in a restrained or qualified sense, is the true guide in the application of the rule; for in the instance of the limitation to heirs general there is no such comprehensive intention expressed; and the rule, by vesting the inheritance in the ancestor, embraces his heirs to a greater extent than the testator can be supposed to have contemplated, if we attend only to the legal import of the dispositions he has made, considered as unaffected by the rule.

There appears to be a very cogent reason why no judicial decision can be produced in favour of a

(x) "If it vests in the first heir general by purchase, it cannot go in succession from him to succeeding heirs of the same ancestor, not being heirs general of such first heir; but may eventually go to strangers, either in defect or exclusion of heirs of such ancestor. For if such ancestor be the father or *ex parte paternâ* of the heir so taking by purchase, and such heir should leave no heirs *ex parte paternâ*, the succession will be to his heirs *ex parte maternâ;* and if such ancestor should be the mother, &c." Fearn. C. R. 143.

quasi descent to the heirs of the body, as in Mandeville's case, the ancestor taking an estate of freehold, for the rule which forbids such a descent under such circumstances is of antiquity as high as the recorded proceedings of our courts; and this, therefore, is only to say in effect that no case can be found which directly contravenes the rule.

It should seem that Mr. Fearne's reasoning fails to establish his point of incompatibility, inasmuch as his proofs are derived from the absence of all authority in favour of a *quasi* descent to the heirs of the body in cases where the rule, and the *quasi* descent, could not possibly co-exist; and if an authority against such a descent in the teeth of an express declaration could be produced, it would only prove the very point on which Mr. Hargrave insists, that such a declaration will not exclude the rule.

The question at issue is, whether a clear declaration of the testator that the devise shall take effect as if the rule had never been laid down, will prevent the union of the limitations or not. Lord Northington says there can be no doubt that in such a case courts of law and equity must interpret the word "heirs" in a sense contrary to its obvious meaning, and not as a word of limitation to the heirs of the body of the tenant for life; and Mr. Justice Blackstone intimates a similar opinion; though

neither of these learned persons tells us *how* the limitation to the heirs would operate. Mr. Hargrave says, that this strong sort of case has not yet occurred in a court of justice: but insists that the rule would apply. The argument of Mr. Fearne would seem to treat the controversy as altogether idle, and to attribute the same result to a negative or affirmative resolution of the question, insisting that in the one case the rule, and in the other the law, as abstracted from the rule, would refuse effect to the limitation to the heirs as an independent remainder; founding his opinion on a principle interwoven in the law of descent, of which the existence is proved by the non-existence of authorities which never could exist while the rule remained in force, and which, if they did exist, would go to annihilate the whole subject of discussion.

The learned editor of the first Institute, in an annotation (*y*) upon the rule, has pointed out a course of enquiry, with the view of affording a solution of the question, whether, in the instance of a devise to one for life, and a subsequent devise to the heirs of his body, followed by an express declaration of the testator that by the devise in question he means to give the ancestor an estate for his life only, and to give an estate in fee by purchase to his heirs, the rule in question is of

(*y*) Butl. Co. Litt. 376 *b*. *n*. 1.

that very rigid and forcible nature, as to be unaffected, and uncontrolled, by these express words? If it be admitted that where a testator has once devised to a man for life, and afterwards to the heirs of his body, no other words, however positive and express, shall control the legal operation of the words "heirs of his body," it will then remain to enquire into the ground of the supposed inflexibility and rigidity of the rule. Is it that it is against the law of the land that lands should be conveyed to the ancestor for life, with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take if they take as purchasers? To resolve this question, it should first be settled what estate or estates the heir, or heirs of the body, would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate scientific legal expressions. If devises so worded would be held contrary to law, the necessary conclusion is, that the *object* intended to be effected by the testator is against law. The annotator then suggests three modes of construing the limitation to the heirs of the body as it stood in the case of Perrin *v.* Blake. 1. As limiting the estate to the first and other sons of the first taker, successively in tail, with remainder to the daughters, as tenants in common in tail. 2. As vesting the inheritance in the person who at the time of the ancestor's decease should be the heir of his body, as the stock of a new inheritance.

3. As limiting the inheritance so as to vest it first in the person answering at the time of the decease of the ancestor to the description of heir of his body, and on failure of issue of that person to vest it in him who shall answer that description at the time of such failure of issue; and so, while there are any such heirs remaining, as in the case of John De Mandeville, by a compound operation of descent and purchase, it being very difficult, he observes, to say how the heirs would take. Of these possible constructions, Mr. Butler justly observes that the first must be laid aside, as the courts have not thought themselves warranted in adopting it; that the second is inadmissible, as embracing only a particular line of heirs, in exclusion of the rest; and as to the third, he proposes to try its legality by the test above mentioned, *viz.* that of supposing it to be expressed in the most accurate and technical language. It is certain, he says, that such a limitation would be good in the common case of a devise to A. for life; remainder to the right heirs, or heirs of the body of J. S. Why, it may be asked, should the estate in the ancestor make any difference? And after observing that the case of an equitable estate for life, with a legal remainder to the heirs, where the remainder is allowed to take effect according to the third construction, proves nothing as to the legality of that construction, where both estates are legal, considered with respect to the feudal principles which are supposed to have given occasion to the rule, inasmuch as the lord would not have lost the fruits

of his tenure, nor would the fee have been put into abeyance; he refers the reader to Mr. Hargrave's treatise, and, if it convince the reader that the third construction is contrary to law, the consequence will be that the devise must be left to its legal operation, and the heir must take by descent: but if the reader of the annotation should think that the third construction is such as the law allows, still there would remain a formidable objection to it in a series of adjudications from 18 Edw. 3. by which devises of the nature of those in question have been construed to vest the inheritance in the ancestor.

A doctrine which on a cursory view may seem to favour the FIRST of these constructions of the words "heirs of the body," *viz.* that of a strict settlement, is familiar to courts of equity, in cases where the trust is executory or directory, and where that Court considers itself as instructed by the testator to fill up the outline of his intention with technical accuracy. If the legal estate be devised to trustees, and the usufructuary interests are to arise by virtue of some conveyance or settlement directed to be made by them, the Court does not suppose the devise and the direction to be mere circuity and surplusage, and that the estates to be taken through the medium of such conveyance or settlement are to be the same estates which the Court would have decreed the trustees to make, if the testator had given no direction, but had contemplated the residence of

the legal estate in them. Though the nature of marriage articles, which is necessarily executory, and their leading object, which is to secure a provision for the issue, afford a strong *primâ facie* presumption in favour of an intention to refer the completion of informal or inadequate limitations to a future instrument, which must be wanting in a will, (z) yet it is now well established that the

(z) "In marriage articles the object of such settlement, the issue to be provided for, the intention to provide for such issue, and in short all the considerations that belong peculiarly to them, afford *primâ facie* evidence of intent, which does not belong to executory trusts under wills." *Per* Lord Eldon in Jervoise *v.* Duke of Northumberland, 1 Jac. and Walk. 559. This was a devise of copyhold *estates* at, &c. to testator's son R. W. G., *to be entailed* upon *his male heirs*, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2500*l.* to be raised upon the estates for female children each; the above estates to be liable to all his debts, and to the fortunes left to his younger children, unless otherwise discharged. The legal estate was not in the testator. In 1816 a bill was filed for the purpose of having the rights of all parties declared; when, after full argument, Sir Thomas Plumer, Vice-Chancellor, decreed, that R. W. G. was entitled to an estate tail. On the faith of this decision, the estate was settled on the marriage of R. W. G.; and being afterwards contracted to be sold to the duke, under the powers of the settlement, the duke's counsel thought the title could not be safely accepted without the sanction of the Lord Chancellor's opinion upon the construction of the will, and a bill was accordingly filed. His Lordship was of opinion, that it was not such a title as a purchaser could be compelled to take. This was a peculiar case. The first question was, what estate R. W. G. would have taken at law if the legal fee had

been in the testator? For if he would have taken less than the fee, no trust could arise. The purchaser's counsel contended, that, even at law, R. W. G. might have been held to take for life only; (and for this purpose Gretton *v.* Haward, *supra*, 133. and Doe *v.* Jesson, *supra*, 138. were cited.) On the other side, it was argued that he would have taken an estate tail; or that if he would have taken in fee the trust was not executory in the sense of requiring a strict settlement. Lord Eldon thought that the legal fee would have passed, and that the equitable fee did pass, under the word "estates," to R. W. G.; and after observing that the question was, whether the words "to be entailed," &c. cut down this fee to an estate tail, added,—"Now, if any one is so bold as to say, these words operate to cut down this equitable fee, by force of these words, without any act to be done by him who had taken the fee, whether, without quarrelling with his fortitude, I should put it on that construction, is very different from undertaking to say, that, in judicial construction, the purchaser is quite safe in considering this as a trust executed, by creating an estate tail. The obvious meaning is, that it is *a thing to be done;* and the words "to be entailed" render it doubtful, first, whether the words of the devise create an estate tail, unless it be created by something to be done; and next is it clear what is the meaning of it, if it be directory? Unless it were for the ambiguity in the words 'to be entailed,' one might get over the grounds of argument that he was tenant for life, which arise from the subsequent expressions." Here then it was doubtful,—1. Whether there was any trust. 2. Whether if there was a trust, it was directory. And, 3. Whether if directory, the Court was called upon to execute it by decreeing a strict settlement. If it had been necessary to decide, the Court would probably have considered the will as creating a trust to be executed by a strict settlement, first ascertaining the legal construction. An act of parliament was obtained for carrying the contract with the duke into effect.

Equity interposed in these cases of executory trusts, on the ground that the testator had referred the execution of his intention to a future conveyance to be made by the trustees, and ultimately, therefore, by the Court. By framing the limitations of the conveyance in conformity to the legal construction of the limitations as expressed in the will, the intention would have been liable to be instantly defeated by the first taker, and the intervention of the Court have been reduced to an idle ceremony. In order, therefore, to secure the estate to the issue, so long as the rules of law will permit, (which is always the object of testators in creating an intail) and thereby to render the direction effective, Courts of equity executed the trust by decreeing a strict settlement.

The distinction between trusts executed, and trusts executory, was not established without a struggle. In Bagshaw *v.* Spencer, Lord Hardwicke treated "all trusts as in the notion of law executory, and to be executed in the Court of Chancery by *subpœna*, as the old books speak;" (1 Coll. Jur. 413.) observing that "one essential part of the trust was, that the trustee was to convey the estate at some time or other, whether the testator had directed it or not, and that so much every testator was presumed to know; and that therefore one might reasonably doubt how it could make any substantial difference, whether the testator had in words directed a conveyance or not." (*ib.*) But admitting that testators must be presumed to know that, in the absence of any direction, the trustees are bound in equity to convey according to the beneficial interests, still Lord Hardwicke's reasoning could hardly be supported; inasmuch as there appears to be a substantial difference between the actual creation of certain equitable estates, with an implied direction to carve out from time to time corresponding legal estates, and an express direction to make a conveyance in order to the creation *uno flatu* of a set of limitations, involving as well the legal as the beneficial ownership. If Lord Hardwicke's assumption were correct, if the direction to settle or convey only expressed

what equity implies whenever a trust is raised, then there would be an end of all pretence for any deviation from the legal construction, and to decree a strict settlement would be to make a perfect equitable limitation express a totally different meaning from a legal limitation in the same words.

Courts of law, jealous of the jurisdiction assumed by Courts of equity, and anxious to break through the narrow rules by which they were bounded, made some unsuccessful attempts to found upon the decrees of the latter Courts, directing a conveyance by way of strict settlement, new rules for the construction of legal devises. Thus in Perrin *v.* Blake, the arguments of the judges, who were against the application of the rule in Shelley's case to the devise then in question, were partly founded on the practice of equity in relation to the execution of trusts, and on the expediency of assimilating the legal to the equitable construction. The language of Lord Kenyon in Doe d. Phipps *v.* Lord Mulgrave, 5 T. R. 320. may be thought to give some countenance to this latitude of legal interpretation. In commenting upon the devise in that case, his lordship observed that if the testator had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, those were precisely the terms in which he would have given such instructions, and that in construing wills we must take into consideration the short hints of the devisor, in order to discover his intention; and Buller, J. observed that the will, though expressed in short terms, was so clear that no person but a *technical lawyer* could entertain a doubt as to its meaning, and that it was an epitome of a strict settlement. But in later times Courts of law have not thought fit to construe devises to heirs of the body, &c. as equivalent to limitations in strict settlement. Even if Courts of equity had chosen to place trusts executed upon the same footing with trusts executory, Courts of law would not have been called upon to depart from their established principles of construction, with a view to promote uniformity of decision, but would best have

consulted that object by evincing a steady determination to adhere to those principles, in the hope of deterring Courts of equity from assuming to lead where they ought to follow. Lord Mansfield appeared to regard with a degree of uneasiness, which was apt to break forth in querulous and disdainful remarks, the wide and increasing range of equitable jurisdiction: but in allowing Bagshaw *v.* Spencer to influence the construction of legal devises, he was in truth holding out a direct encouragement to "the great men who preside in Chancery" (*supra*, 73.) to dictate new rules of property to Courts of law.

Equity, in decreeing a strict settlement, regarded the reference to a future act as tantamount to an express declaration by the testator himself, that the disposition made by him was merely ancillary to a formal and complete settlement of the estate; that what he himself had done amounted only to an imperfection, (1 Jac. and Walk. 570.) and that having shortly expressed his main object to be the fixing of the estate in the family of the first taker, he left it to the Court to secure that object in a legal and effectual manner. The form of settlement best adapted to attain the end has long been well settled, and in general use. The Court, therefore, appears to lend its extraordinary aid on these grounds;—that the purpose is denoted, but the disposition defective; that the testator has authorized the Court to supply the defect; and that the mode of supplying it is pointed out by established practice.

Some judges of equity appear to have raised a distinction of rather a subtle and perplexing nature between—executory trusts, which are to be executed either by pursuing literally the limitations expressed in the will, or if those limitations should be too informal for insertion in a deed, by pursuing their legal construction and effect; and—executory trusts, in the execution of which the Court is required to deviate from the words and strict legal operation of the devise. Cases of the first class are those in which the testator, though he contemplates a future conveyance or settlement, is supposed to have given complete

male, then he gave and devised the said *estate* to the *heir* male of the body of his (testator's) daughter E. N.; but if E. N. had no issue, then he gave and devised the said estate to his next heir at law, provided he assumed the name of N. but if he refused or neglected so to do, then he gave and devised the said estate to the second in the remainder, that is, to the person who would succeed to the first heir at law in regular succession; and his intention was that his natural son T. N. should not enter on the estate until he should attain twenty-three. And reciting that he was not certain whether it was possible to *entail* an estate not yet purchased, he directed his executors to consult and take the opinion of some eminent lawyers upon the case; and if they held that such entail as was *expressed* in the will was repugnant to law, then his will was, that his personal estate should be divided equally between his said two natural children T. and E., &c. The Lord Chancellor *said* it was impossible to argue against T. N.'s having an estate tail, and that the money must be invested, and the land settled to the use of T. N. and the heirs of his body, with a contingent remainder to the *person* who should answer the description of heir male of E. N. at the time of her death in *tail*, with remainder to the right heir of the testator: but counsel suggesting that as this was an *executory* trust, the Court would interpose, after the estate tail to T. N., a limitation to trustees to preserve the contingent remainder to the heir male of E. N. the daughter, his Lordship was of opinion that such a limitation should be inserted; and *decreed* that the uses were to be to T. N. and his heirs in tail male, with remainder to trustees to support contingent remainders, remainder to the heirs male of E. N. the daughter in *fee;* and if she should *have* no heirs male, then to the heir at law of the testator in fee. Reg. Lib. A. 1789. fol. 632. Here the testator had in terms assumed to create the entail; but as the nature of the trust necessarily devolved upon the Court the duty of framing the limitations, the Court thought that the informal limitation to the heir male of the daughter might be moulded, and a limitation to trustees in-

traduced; that in these respects something was left to be done: but that as to T. N. and his issue, the testator had fully executed his own intention. This was, therefore, according to the view taken by Lord Thurlow, the case of a trust executory, with limitations in part admitting, and in part excluding, the equitable interposition of the Court. It seems difficult to contend that the testator must be taken to have meant the particular species of entail directed by the decree, or that the trust was not executed, or executory, throughout, so as either to preclude altogether the interference of the court in shaping the limitations, or to let it in to the full extent of framing and expanding the whole into a formal, consistent, and secure settlement. It is not clear on what principle the direction to limit the remainder to the heirs male of the daughter, as a *descriptio personæ*, in *fee*, with an alternative contingent remainder to the testator's heir at law, was founded, unless the word "estate" was considered as equivalent to words of limitation in fee engrafted upon "heir male" in the singular, so as to bring it within the reason of Archer's case: but it should seem that the word "estate" has not the same effect as superadded words of limitation in turning the word "heir" into a word of description; and that "heir male of the body" without superadded technical words of limitation, is, whether preceded by a freehold in the ancestor or not, *nomen collectivum*, even in a deed, (Harg. Co. Litt. 8 *b. n.* 4.) comprehending all the heirs male in succession, to take as in Mandeville's case. The direction to limit the estate to the heirs male of the body of the daughter in *fee* was rather equivocal. If executed by a limitation, to the heirs male of the body, their heirs and assigns for ever, the superadded words would be merely nugatory, (*supra*, 55.) and the limitation would create a *quasi* estate tail. The testator clearly did not intend a limitation in fee to the person answering the description of heir male of the body of E. N.: but contemplated an "entail" (see 1 P. Wms. 58.) of the estate upon the issue of his son, and daughter; the words "if E. N. had no issue," preceded by a limitation to the heir in its

collective sense, being of the same import as having no issue at any future period, however remote; nor would a limitation to such individual heir in tail have been consistent either with the intention, or with the legal construction. The view which the Court took of the trust, as being of an amphibious nature, involved the execution of it in these embarrassments; and we may fairly characterize such a trust by applying to it the expression used by Mr. Watkins in speaking of the succession in Mandeville's case—an uncouth non-descript.

The distinction in question was acted upon by Sir William Grant, M. R. in Blackburn *v.* Stables, 2 Ves. and Beam. 367. The testator devised the remainder of his real and personal estate in trust to his nephew J. B., and to M. F. his executors, for the sole use of a son of the said J. B. at the age of 24; if he had no son, to a son of testator's great nephew J. B.: but if neither of those had a son, then to a son of testator's great niece's daughter E. F., with a direction to take testator's name. But on whomsoever such his disposition should take place, his will was that he should not be put into possession of any of his effects, till the age of twenty-four, nor should his executors give up their trust till a *proper entail be made* to the *male heir* by him (the person so being entitled). J. B. the nephew had no son born at the testator's death: but his wife was then *ensient* with a son, who was afterwards born and attained twenty-four. His Honour, after stating that he knew no difference between an executory trust in marriage articles, and in a will, "except that the object and purpose of the former furnish an indication of intention that must be wanting in the latter," observed that "if marriage articles limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention: but if a will *directs* a limitation for *life*, with *remainder* to the heirs of the body, the Court has no such ground for decreeing a strict settlement; that a testator *gives* arbitrarily what estate he thinks fit, and that there is no presumption that he means one quantity of interest rather than ano-

ther, an estate for life, rather than in tail, or in fee; that the Court must necessarily follow his words, unless he has himself shewn that he did not mean to use them in their proper sense; and has never said, that merely because the direction was for an entail, the Court would execute that by decreeing a strict settlement." But this reasoning does in truth appear to be setting up a distinction between marriage articles, and executory trusts in wills, which, if admitted, would absolutely destroy the analogy between them. For if the presumable intention be not the ground on which the Court lends its assistance in both cases,—what is it that constitutes the strong point of resemblance between them? What characteristic have they in common? If when marriage articles direct a limitation to A. for life, remainder to the heirs of his body, the Court executes *that* by a strict settlement: but when an executory trust in a will directs the same limitations, the Court executes *this* by limiting an estate tail to the first taker,—does it not follow that there is a most essential difference between them? and that the presumption of intention, from the nature and purport of the trust, is not, as all the leading authorities upon the doctrine state it to be, the ground on which the Court has acted in the execution of testamentary trusts of a directory nature? If the observations in question were intended to apply to trusts *executed*, their propriety is not disputed: but, as applied to executory trusts, they seem to strike at the root of the principle which assimilates such trusts to marriage articles.

The Court then proceeded to enquire what estate the son of J. B. would have according to the *literal import* of the direction in the will. "Certainly," said Sir W. Grant, "the male heir by him cannot be the first taker; there must be some estate limited to the ancestor, and the male heir can only take by way of *remainder*. Suppose the limitation *made* to the plaintiff either *generally*, or for life, the *remainder* will be 'to the male heir by him, that is, to the heirs male of his body,' which would make an estate tail in the plaintiff." So that the Court felt

itself obliged at last to mould the words, and to speculate upon the mode in which the limitations were intended to be framed; admitting, therefore, that the testator had given no definitive directions concerning them. "The proper entail to the male heir," of which the testator so earnestly enjoined the making, before the trustees should give up their trust, was to be satisfied by supplying formal *words of limitation* after the indefinite gift to the son, and by making an entail capable of transmission to the heir male, though the words seemed strongly to indicate that the male heir of the first taker was designed to be the root of the entail; the entail was to be *made* to such *heir*, which could not well be by constituting his ancestor the donee in tail, and treating the limitation to the heir as designed merely to enlarge the estate of the ancestor. Sir William Grant proceeded to observe that "it is settled that the words 'heir' or 'heir male of the body' in the singular number are words of limitation, not of purchase; unless words of limitation are superadded, or there is something in the context to shew, that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will, from which that can be collected. Here is an absence of every circumstance that has commonly been relied on as shewing such an intention. The word is 'heir' not 'issue.' There is no express estate for life given to the ancestor; no clause, that the estate shall be without impeachment of waste; no limitation to trustees to preserve contingent remainders; no direction so to frame the limitation, that the first taker shall not have the power of barring the entail. Every thing is wanting that has furnished matter for argument in other cases. The words are, therefore, to be taken in their legal acceptation, and the son of J. B. is entitled to have the conveyance made to him in tail male."

This is certainly a strong case. If an express direction to make a proper entail, appended to informal and inaccurate limitations, altogether incompatible with a literal execution of the trust, be not sufficient to warrant a departure from the legal

construction, it will be difficult to support the doctrines on which many of the determinations prior to Blackburn *v.* Stables, upon trusts of this nature, appear to have been founded. This case seems to fall within the description furnished by Lord Northington in Austen *v.* Taylor of trusts which require the Court to model the limitations. Neither the doctrine laid down in the prior cases, nor that laid down by the Court in the case under consideration, can stand, consistently with the position that a direction by will to limit the estate for life, with remainder to the heirs of the body, affords in itself no ground for decreeing a strict settlement; for it cannot be doubted that in such cases the testator never intends to use the words in their strict technical sense. He never means to give more than an estate for life to the first taker, nor to put it in his power to bar the issue. If therefore the legal construction is not to be pursued in the execution of executory trusts where it would disappoint the intention, it should seem that the case put by the Master of the Rolls would have all the ingredients which had ever been deemed essential to constitute a trust indicative of the making of a strict settlement. It is observable that a clause that the estate shall be without impeachment of waste, or a limitation to trustees to preserve, or a direction that the first taker shall not have power to bar the entail, would have no influence upon a legal devise, or an executed trust; and that the absence of these circumstances was immaterial so far as regarded the literal import of the will.

In Marshall *v.* Bousfield, 2 Mad. 166. (*supra* 24.) Sir Thomas Plumer, admitting an executory trust to be created in that case, thought the testator intended that it should be executed by making the first taker tenant in tail, notwithstanding an express direction that the estates should be *settled*, (a word on which Lord Northington placed an emphasis) by *able counsel*, (a circumstance relied upon in former cases, White *v.* Carter, Amb. 670, 2 Ed. 366. Bastard *v.* Proby, 2 Cox's Ca. 6.) notwithstanding too the informality of the limitations, and the use of the word

issue instead of heirs of the body, which is one of the ingredients noticed by Sir W. Grant, in Blackburn v. Stables, as affording ground of argument. Thus a doctrine, originally applied to ameliorate the legal construction, because it destroy the intention, became ultimately subservient to that construction, because it demonstrates the intention.

The case of Leonard v. The Earl of Sussex, 2 Vern. 526, a leading case upon the doctrine of executory trusts, had no other circumstances than a trust to settle to A. and the heirs of his body, (there being no restriction of the estate of A.) with a direction that special care should be taken in such settlement that it should never be in the power of A. to dock the intail during his life. Testators in directing a settlement never intend to put it in the power of the first taker to defeat that settlement; and the direction that special care should be taken &c. rather weakened than strengthened the presumption that the testator intended A. to be merely tenant for life. That direction seemed to import that A. was to take an estate tail without the power of docking it: but the trust being directory, the Court regarded only the main object—a settlement—and the making such settlement effectual.

The expressions which fell from Lord Eldon in Jervoise v. the Duke of Northumberland, and the inclination of his Lordship's opinion upon that case, (as collected from the report and the impression produced on those who heard him,) are scarcely reconcileable with a full concurrence in the views taken by other judges in some, at least, of that class of cases, where the testator is admitted to have left something to be done, a conveyance or settlement to be made, but is supposed to have prescribed the precise nature of the estates to be created by the future limitations, although such limitations may not have received from the will itself their ultimate legal form, or may not be exactly calculated to ensure the presumable object of an intail. His Lordship observes (1 Jac. & Walk. 572.) that all the judges have admitted the principle on which the doctrine of executory

trusts is built, differing only about its application; and adds, "without going through all the cases, which are well known, I will refer to Mr. Fearne's work, where he has shown that the distinction has not only been pointed out by every Chancellor who has had any thing to do with these questions: but where, after pointing it out in case after case, and in every decision from first to last, and after observing on what fell from Lord Thurlow in Jones v. Morgan, and on the cases of Bagshaw v. Spencer, and Garth v. Baldwin, and another case before Lord Hardwicke, and on the difficulty of reconciling them, and particularly Bagshaw v. Spencer, and Wright v. Pearson, he sums up, most ably, *what may be said to be the test law on this subject; and to which, as there laid down, I, for one, am ready to give my full assent.*" Now, I think it will be found, upon a careful examination of Mr. Fearne's discussion of the cases upon executory trusts in wills, that at the close of every paragraph he most anxiously marks the executory medium, the reference to a future act, the unexecuted purpose, raising the presumption that the testator had something in view beyond the mere formal investiture of certain quantities of interest with their correspondent legal estates, as the distinctive feature, the acknowledged characteristic, of an executory trust. And, in the summing up of his observations, he enforces the same principle, stating that "limitations, whose effect is referred, by the will itself, to a conveyance directed to be made for their establishment, may reasonably be considered as left to some degree of modification, by that supplemental part of the will, viz. the conveyance to which their completion is referred;—that they are in a state of embryo, till delivered by the directed conveyance, which is intended to give them their ultimate form." Fearne C. R. 93. But in some of the cases to which we have been directing our attention, the Court's obstetric aid brought forth a mere abortion. It does not seem to have occurred to Mr. Fearne, that executory trusts were divisible into two species; or that, where the will clearly considers

the creation of the limitations as dependent on a future act, and where those limitations, if executed in terms, or according to their legal operation, would put it in the power of the first taker instantly to render that act unavailing and futile: there must, notwithstanding, be some additional ingredient thrown in, as a clause that the estate of the first taker shall be without impeachment of waste, or a limitation to trustees to preserve, or a direction that he shall not have power to bar the entail, or powers of leasing, jointuring, &c. which, though incapable of affecting the construction of a legal devise or executed trust, may, without any violation of consistency, convert a trust, which, without that ingredient, would be executory only in the sense of entitling the first taker to an estate tail, into a trust executory in the sense of being declaratory of an intention to make a strict settlement. No such conclusion seems to flow from the "text law" as laid down by Mr. Fearne, or the comments of Lord Eldon; whose intimate knowledge of subjects of this nature, and painful diligence in days which, as his Lordship remarks, may now be called "days of yore," in collecting the opinions of the most eminent real property lawyers, render those comments of greater value than ordinary dicta.

The language of Lord Eldon in the Countess of Lincoln v. the Duke of Newcastle, 12 Ves. 218, where his Lordship laid it down that "there was no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles, and that such a distinction would shake to their foundation the rules of equity," has been thought to require the qualification introduced in Blackburne v. Stables, that "the object and purpose of marriage articles furnish an indication of intention which must be wanting in a will." But Lord Eldon's position will appear to be strictly correct, if understood in the sense which the terms obviously import; for his Lordship is speaking of that species of trust to which Mr. Fearne alludes (Fearne, R. 93.) when he describes an executory trust as a trust directory only, prescribing the limitations of some future con-

veyance or settlement, in contradistinction to a trust executed, where the trusts are directly and wholly declared by the testator to attach on the lands immediately under the will itself. His Lordship meant to say that where a trust is executory in the sense affixed to this term by the cases referred to by Mr. Fearne as establishing the distinction between trusts executed and executory, its execution must be governed by principles analogous to those which regulate the execution of marriage articles. The qualification rather embarrasses than elucidates the proposition. Lord Eldon has stated (1 Jac. & Walk. 570,) the general principles of the doctrine of which we have been treating, correcting at the same time any erroneous impression as to the import of his observations in the Countess of Lincoln v. the Duke of Newcastle, in the following terms. "Where there is an executory trust (in the sense which the Court puts on these words) I apprehend the Court has been in the habit (certainly with some exceptions, and perhaps Bagshaw v. Spencer is one of them, but certainly with some exceptions) — I say, where there is an executory trust, where the testator has *directed something to be done*, and has not himself, according to the sense in which the Court uses these words, [and which sense his Lordship, as we shall see, afterwards explains,] *completed* the devise in question, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection, with respect to the execution of that intention, *the Court enquires what it is itself to do*, and it will mould what remains to be done so as to carry that intention into execution. I repeat where there is a trust executory, because one is a good deal confused by the inaccuracy of the expressions trust executory, and executed: (see 1 Eden 95,) the latter, no doubt, in one sense of the word, is a trust executory; that is, if A. B. is a trustee for C. D., or for C. D. and others, that in this sense, is executory, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance, and execute the trust: but these are cases where the testator has

clearly decided what the trust is to be, and as equity follows the law, where the testator has *left nothing to be done*, but has himself expressed it, there the effect must be the same, whether the estate is equitable, or legal. I make these observations with reference particularly to the Duke of Newcastle v. Lady Lincoln: if it is supposed I ever stated that there was no difference between marriage articles and trusts in wills, I must say I never stated any such thing, if it is understood in this sense, that there is no difference between marriage articles, which are to be carried into execution according to the intention, and trusts *executed*. I never made use of such an expression; nor does the report, I think, seem to import it. *I then intended to allude to the distinction in those cases in which a party takes upon himself to be his own conveyancer;* and throughout it appears to me I asserted most anxiously, (and it is what is the result of all the cases) that where a trust is executed, in the sense which I have stated, this Court will follow the law."

The inference to be drawn from these observations is that "a will which does not give by way of direct gift, but leaves it to the law to frame the conveyance under which the party is intended to take by a general expression of intention, is to be considered as creating an executory trust," (see 12 Ves. 231. in Countess of Lincoln, *v.* Duke of Newcastle) and that if the general purpose would not be satisfactorily attained, (having regard to that equity has been in the habit of deeming an effectual attainment of a general purpose to entail) the Court will assume that the testator has not taken upon himself to be his own conveyancer; and will execute that purpose upon its own principles, and according to its own views of the mode and form best calculated to satisfy the conscience of the Court, by giving to the presumable object of continuing the estate in the family of the first taker as much of stability and permanence as the law will allow.

Though this note has swelled in its progress to rather an inconvenient bulk, I cannot close it without noticing some re-

marks by the learned editor of the treatise of Equity, (1 Fonb. Eq. 5th edit. 417. n.) which militate in some respects against the principles on which the doctrine of executory trusts appears to stand. After an investigation directed to prove that Courts of equity have applied a *principle of construction* to executory trusts which they did not conceive to be applicable to immediate devises or trusts executed; the learned annotator takes notice that in Ambrose v. Hodgson, 1 Doug. 336. Buller, J. laid it down, as an established rule, that the intention of a testator expressed in his will, if consistent with the rules of law, shall prevail; and that the qualification, "if consistent with the rules of law," is applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words: but that the question whether the intention be consistent with the rules of law or not can never arise till it is settled what the intention is, which can only be discovered by taking the whole will together. The learned editor proceeds to observe that "Leonard v. Earl of Sussex is particularly apposite to the purpose of trying whether the rule of legal construction, as above stated, be the rule by which Courts of law will proceed in the construction of wills; and that if the application of the rule of legal construction would have led to a different decision, one of these consequences must follow, either the decree in that case was against the intent, or the true rule of legal construction is not sufficiently comprehensive in its application to every case to effectuate the intent. But if that part of the legal rule of construction 'if consistent with the rules of law' be applicable only to the nature and operation of the estate or interest devised, and the whole of the will is to be consulted, (which I agree in certain cases [q. *all*] it must) the legal *rule of construction* so stated appears to me absolutely *incapable of receiving an additional extent in equity*; and that those clauses which have hitherto been conceived to be void, because repugnant, ought to control those words of limitation to which they are repugnant, for when a man devises an estate in terms

which carry a fee simple or fee tail, and proceeds to declare his intent, that the devisee shall not alien the devised estate, it seems to be a fair inference, that in using terms which carry the absolute or qualified fee, he was either acquainted with their technical import, or being unacquainted with their import, had inadvertently applied them; their legal effect being so inconsistent with his intention, declared in terms, not of a peculiar technical signification, but of plain, familiar, and common parlance."

But the doctrine of executory trusts does not, as I apprehend, involve any question respecting the nature or application of any rule of construction, properly so called; nor does the rule laid down by Mr. Justice Buller appear to be irreconcileable with the principle of that doctrine, as applied in the case of Leonard *v.* Earl of Sussex. The Court did not in the *exposition* of the will itself *construe* the words as importing in themselves limitations in strict settlement: but finding a direction to settle, which could not be executed with effect according to its literal terms, *departed* from the words of the will in the *execution* of a *trust*, which specified the general object, but confided the mode of effecting it to the discretion of the Court. It does not appear to be requisite to the support of the doctrine in question, that "the legal rule of construction should be capable of receiving an additional extent in equity;" though it is essential to the maintenance of the analogy, which ought to subsist between the construction and effect of the same instrument in courts of law and equity, that the legal rule should *not* be capable of receiving an additional extent in equity. The utmost effect attributed to the direction in Leonard *v.* Earl of Sussex, that special care should be taken in the settlement that it should not be in the power of the first taker to dock the intail, was that it strengthened the presumption, arising from the direction to settle, that the testator meant *something* more than a literal execution of the trust: but that clause was not considered as expressive of the modifications and limitations which courts of equity, on grounds

very different from mere rules of construction, regard as the means best adapted to secure the substantial and ultimate end and purpose for which the testator had, by a sort of posthumous instruction, called in the extraordinary aid and counsel of the Court. These modifications and limitations, indeed, arise instantly upon the death of the testator, to the extent of enabling the parties to act in equity upon the ownership which such limitations would confer: but this effect results, not from the operation of the devise, as construed by the Court, but from the rule of equity, that what ought to be done is, for certain purposes, to be considered as done. The principles of the doctrine of executory trusts, as thus stated, may appear to savour of refinement: but on examination they will be found to contain the real and substantial grounds, on which the distinction between trusts executed and trusts executory is built; a distinction which the learned annotator strongly contends must now be received as a well settled and rational distinction. If the rule of legal construction were established to the extent contended for by Mr. Justice Buller, it would not preclude a court of equity from saying, that where the trust is purely directory, the mode of framing the limitations rests with the Court; nor authorise a court of law, in the instance of a legal devise, or a court of equity, in the instance of a trust executed, to say that such a prohibition as that contained in Leonard *v.* Earl of Sussex, against docking the intail, operates to create *vi sua* limitations in strict settlement; but both courts must still, as now, reject such clauses for repugnancy. It is clear, however, that Mr. Justice Buller's position, in stating that the rules of law apply only to the nature and operation of the estates and interests devised, is inaccurate; for though the rule in Shelley's case is so applicable, there are other rules which control the ordinary acceptation of the words. Thus, where a testator devises his messuage or close to A. indefinitely, it is no less clear, as Lord Mansfield observes, that the testator means to give the absolute interest, than where he bequeaths his horse or any other

execution of marriage articles, and of such trusts in wills as are purely directory, is governed by the same principles. The true question to be asked upon a devise which raises a doubt as to the creation of an executory trust appears to be, whether the bounty of the testator is designed to reach the objects only through the instrumentality of the trustees or the court, or to go direct to them by immediate gift from the testator himself; whether the will regards the beneficial interest as consequent on a conveyance of the legal estate, or expressly creates that interest, without reference to any future act, leaving the right to a conveyance, as incident to such interest, to be regulated by the rules of equity. The Court considers itself, in the former case, as authorised to model the limitations; but in the latter, as bound down to the rules of legal construction.

The reason why a court of law cannot thus model a legal devise is apparent in the nature and objects of its jurisdiction. The slightest consideration will serve to shew that the adoption of a

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chattel; but the rule of law says that A. shall have only a life estate.

See further as to executory trusts Fearn. C. R. 82. 1 Sand. Us. 4th edit. 310. 1 Fonb. Eq. 5th edit. 407. *n.* (*s*). Prest. Est. 405., where the distinction in cases in which the testator is said to have been his own conveyancer appears to create some embarrassment.

similar doctrine by courts of law would be productive of the most absurd and mischievous consequences; for,—1. Equity does not treat the words "heirs of the body" as words of actual settlement; but founds itself upon the express or implied direction to settle, convey, &c., decreeing a legal settlement in proper form, with limitations to trustees to preserve contingent remainders, &c. 2. It proceeds in these cases by analogy to its own practice in the specific performance of marriage contracts. 3. This method of proceeding is agreeable to the peculiar constitution of the Court, which has all the necessary machinery for securing the complete attainment of the end in view. 4. It acts with a strict and scrupulous observance of the maxim *equitas sequitur legem*, not destroying the analogy between the legal and equitable construction of the same instruments; not usurping powers foreign to its nature, and confounding jurisdictions.—It seems incredible that thirty years spent in constant observation of the habits of courts of law and equity should have failed to open the eyes of a judge to a perception of points of difference so prominent and striking. Yet Lord Mansfield, in Perrin *v.* Blake, treated the distinction between legal devises, and executory trusts, as altogether idle; and appears to have been prepared to hold the words "heirs of the body" to include in themselves perfect legal limitations to the first and other sons successively in tail, with remainder to

the daughters as tenants in common in tail, &c. (a) though Mr. Fearne, in his comments upon that case, seems to have taken it for granted that the exclusion of the rule must have let in the construction of a contingent remainder to the heir. (b) But if in every or any case, where the legal effect of a perfect gift is negatived by express declaration, without any intimation of the mode in which the testator intends it to operate, courts of law or equity may assume the right of supplying

(a) "There cannot be a doubt that the heirs of John Williams's body are to take as purchasers successively." And again,—"My opinion is that the intention is clear, beyond a doubt, to give an estate for life to John Williams, and an inheritance to be taken successively by the heirs of his body." *Per* Lord Mansfield. These expressions are rather equivocal: but Willes, J., who concurred in the judgment, and must be presumed to have understood the leaning of the Court, speaks out, and says, "All the sons shall take successively, and all the daughters as tenants in common." 1 Coll. Jur. 319, 322, 308.

(b) "The construction adopted by the Court in Perrin v. Blake, so far from unlocking property, really ties it up for a longer period; and imposes a more strict clog upon it, than the limitations commonly used in marriage settlements. For in such settlements, the first son that attains twenty-one may, by the concurrence of his father, in suffering a recovery, &c. But it is quite otherwise in regard to a limitation to the father for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of the father, if we construe the subsequent words 'heirs of the body' as words of purchase; for then as *nemo est hæres viventis*, it will be impossible to say who will be the heir of the father's body till his decease." Fearn. Cont. R. 132.

the omission, and from several possible constructions, or more properly several conjectural intentions, call that which leaves the legal construction at the greatest distance, we shall indeed be ready to exclaim with the judges of the olden time, (9 Hen. 6. f. 24.) that "a device is marvellous in its operations."

The second construction which would give the estate to the individual first sustaining the character of heir of the ancestor, and the heirs of the body of that person, and there stop, would be destructive of every intention which the testator can be supposed to have formed with respect to the issue; it would exclude all, save one, of the objects designed under the denomination of heirs of the body of the tenant for life, so far as they claimed in that character alone; and all, except one selected line, *in toto*; and admit that line under a different denomination. Without entering, therefore, into other objections, we may dismiss that construction as wholly inadmissible.

Here we might introduce another construction not noticed by Mr. Butler—the construction *children*, which has been fully discussed in a former section.

"I sit," said Lord Northington, (e) "in a court

(e) Fisher v. Touchett, 1 Eden 161.

of conscience, and not in a court of conjecture;—I know nothing that would be so dangerous to the rights of the subject, as for a judge to overlook legal evidence, and throw into the other scale his own fears, suspicions, and conjectures." Let us therefore dismiss all conjectural interpretations; and apply ourselves to the consideration of the *third* construction, which is the only construction warranted by the letter of the devise.

But, with deference to the learned annotator, if the test by which it is proposed to try the legality of this construction be the only test to which it can be submitted with effect, I fear we must despair of ever solving the problem; for it might puzzle a very expert conveyancer to pen a technical scientific limitation, expressive of what is here admitted to be a non-descript species of succession, and which is stiled by turns a *quasi* entail, a descent *per formam doni*, a compound of descent and purchase. Where can we find a precedent for such a limitation, seeing that no case has occurred in which the heirs have so taken, except where the ancestor took no freehold, or a freehold of a different quality; and after we shall have exerted our utmost skill in concocting in our minds (and the mind, unless it can form some distinct idea of the limitation, cannot well suppose it) such a limitation as we conceive best calculated to attain the end,—by what test are we to try its sufficiency, so describe a mode of taking, of which, under the

circumstances in question, we have no example in the books? It seems to me that the process by which we are to be conducted to the desired solution involves greater difficulties than the problem itself.

Is not the limitation in the common case of a devise to A. for his life, and immediately after his decease to the heirs of his body, the only accurate and scientific mode of indicating an intent, that a remainder of inheritance shall vest, not in the ancestor, but, on his decease, in the then heir or heirs by purchase, with a capacity of transmission to all persons being heirs of the body of the ancestor, to the utmost extent to which such a limitation, if operating independently of the ancestor, would be capable of carrying the estate; or, in other words, that it shall have the same operation as in Mandeville's case? That case, and the other cases, in which a remainder so worded has been allowed to describe this species of succession, prove that it amounts to a sufficient expression of the intention; for though Mr. Fearne contends that Mandeville's case, and other cases of that class, so far from being any sort of authority for the heirs taking in the same way in cases where the ancestor actually takes an estate of freehold, affords the strongest ground for a direct contrary conclusion, in the forcible stretch of the law in those cases towards a dement, by a fictitious adoption of it in a partial imperfect degree, where the want of any

freehold in the ancestor excluded the possibility of it in its true and complete state: (*d*) yet, I apprehend, that the ground of construction in those cases was, or must be presumed to have been, the intent that the limitation to the heirs should have the effect there attributed to it; for the absence of an estate in the ancestor could not vary the intrinsic meaning of the words "heirs of the body," whose force "is constituted by the sense they bear." It could not warrant a construction contrary to the import of the limitation to the heirs, which, therefore, when associated with an estate in the ancestor, but disconnected, in point of limitation, from that estate, must *per se* express the same intent, though the rule of law will not permit such intent, so circumstanced, to take effect.

Modes of succession prescribed and regulated by the law of the land, and which the will of the individual cannot alter or control, are clearly not proper subjects of express detailed limitation. The ideas which they include are annexed by law to certain quantities of interest; and when those quantities of interest are given, all the legal incidents of transmission, alienation, &c. follow. So when after the life estate of A. a distinct inheritance is limited to the heirs of his body, the limitation imports that quantity of estate to which the law has appropriated the mixed species of purchase and descent in

(*d*) Fearn. C. R. 143.

question; and it is difficult to say by what means the intent to give just that quantity of estate, and no more, can be rendered clearer or stronger. The mode of taking in question is admitted to be a compound of purchase and descent, and whatever may be taken by purchase may be the subject of an original gift.

The cases of an equitable freehold, and legal remainder, are supposed to prove nothing as to the legality of the construction of a *quasi* descent where both estates are legal. But if in those cases the construction was admitted because there was no objection to it on feudal principles, as the lord would not have been deprived of the fruits of his tenure, nor the fee put in abeyance, they seem to prove that the construction is rejected in other cases on the ground of its militating against those feudal principles, on the ground of that feudal policy on which the rule is supposed to be founded, and not on the ground of an insufficient communication of the intention, which but for these feudal principles would be allowed to prevail. They prove that where the reason of the rule does not interfere, the intent is strong enough to overcome all difficulties; and that rather than permit the intention to fail, the law will call fiction to its aid. Mr. Fearne asks whether that very law, which, in cases where the heirs can take only by purchase, for want of any estate in the ancestor to connect with the limitation to the heirs, strains so far towards a descent as to support the analogy in suc-

cession, and carry it through the same line of heirs, under the pretext of a descent, would not avail itself of any estate of freehold in the ancestor to avoid the necessity for such a fiction, and unequivocally avow a genuine perfect descent? (e) But, on the other hand, may it not be asked whether that law, which favoured pure descents so highly, and whose policy was so hostile to a discordant mixture of purchase and descent, would ever have endured such an amalgamation in any case, much less have been astute, as in Mandeville's case, to devise a plausible pretext for introducing so mischievous a novelty? Would this fiction of a vested inheritance in the ancestor be inconsistent upon principle with the reality of the freehold in him? By limiting the estate to A., for the life of B., in trust for B., remainder to the heirs of the body of B., or to A. for his life, remainder to B. in fee, in trust for the heirs of the body of A., it is clear that this mode of succession may always be created. The question is, whether, if no positive rule applicable to the subject were in force, the same construction could be adopted in the case of several legal limitations to the ancestor, and the heirs, that obtains where the limitations are of a different quality, or where no estate, or only a chattel interest, is limited to the ancestor? There does not appear to be any sound reason why it should not: but the question never can be satisfactorily solved, till the rule has ceased to govern the case, the

(e) Fearn. C. R. 143.

decision of which can alone afford such solution. "What had been," if the rule had not been laid down, "is unknown;—what is, appears." If such construction would be held inadmissible, then the rule is merely the expression of a principle inherent in the very nature of our law of succession: if admissible, the rule is either a positive ordinance, (*f*) introduced for the purpose of preventing frauds upon the tenure, or remedying some other particular mischief, against which no adequate provision would otherwise have existed; or a rule capriciously imposed for the narrow, and apparently unaccountable, purpose of assigning to certain limitations an operation contrary to their natural import, unless that operation be negatived by other expressions. The last of these suppositions stands excluded by its own absurdity; and with respect to the two former, if we adopt that which assumes the existence of a fundamental principle of legal policy decidedly hostile to the disunion of the two limitations,—why, it may be asked, has all the bitterness of judicial reproach been poured out solely upon the rule laid down in Shelley's case? Why has it been denounced as the single impediment to a liberal construction of the devise, and not unfrequently surmised to be a mere assumption of counsel in argument? Why have so many combatants entered the arena, and essayed their utmost strength and skill to overthrow the rule? This supposition

(*f*) Prest. Est. 297.

would reduce the whole conflict to mere knight-errantry.

Another distinguished writer upon the rule remains to be noticed. Mr. Preston in his Sagacious view of the Rule in Shelley's case, (now incorporated into his work on Estates, of which it forms a distinct chapter) appears to me to have placed the rule, as regards its inflexible quality, upon the true ground; and that work, as originally written, is perhaps, better calculated to convey a just idea of the real nature and bearing of the rule, than even the more elaborate discussion of Mr. Fearne. "The rule (observes this writer (*a*)) is of positive institution, and has this circumstance of peculiarity and variance from rules of construction. Instead of seeking the intention of the parties, and aiming at its accomplishment, it interferes in some, at least, if not in all, cases, with the presumable, and, in many instances, the express intention. In its very object the rule was levelled against the views of the parties." Again, (*b*) "it is clear that the case of Perrin *v.* Blake was completely within the reason and the terms of the rule; without any circumstance (besides the intention of the testator, as collected from the express estate for life, and the limitation to support contingent remainders, that the heirs should take distinctly from their ancestor) to shew that the testator did not use these words (heirs of the body) as words of limitation, that is, as com-

(*a*) Prest. Est. 271. (*b*) *Ib.* 285.

prehending the whole class of heirs. This intention, so far from negativing the application of the rule, is the very ground and reason from which it had its origin." And in another passage, after noticing the mode in which the heirs were held to take in Mandeville's case, observing (f) that "strictly speaking, they do not take by descent; for they do not claim as heirs to the person in whom the estate first vests; he is not their ancestor; nor can they, with any precision, be said to take by purchase; for then they would take separate and distinct estates; they take in a mixed right: in a right which cannot be easily defined; by a *quodam modo* descent, a descent *per formam doni* under the statute of intails:" he adds, "when a gift to heirs of the body, taken separately, would confer an interest of this nature, then the rule will apply to a gift connected with an estate of freehold in the ancestor. This position seems to be so clearly maintainable, that every case of this description necessarily invites the application of the rule." But the student should read the Succinct View, as it stood, before an attempt to engraft upon it the *principles* of the modern decisions (g) had in a great measure destroyed the symmetry of its form, and the certainty of its conclusions, making that a mystery which ought to be a science.

It would be doing an injustice to the great names

(f) Prest. Est. 281. (g) *Supra*, Sect. IV.

which I have mentioned, to associate with them other writers, whose works, however respectable, (*h*)

(*h*) "The rule is applied upon a *principle*, which is fully explained by Lord Chief Justice Wilmot in the case of Roe d. Dodson, *v.* Grew, [*infra*, Sect. VII.] namely, that where a testator shews a particular, and also a general intent, which are inconsistent with each other, the general intent will be established, and the particular one disregarded. In all the cases where the rule has been applied, there was a devise to A. for life, with a subsequent devise to the heirs general or special or issue of A.; and the testator had a particular intent to give an estate for life only to A., and a general intent to give estates to all the descendants of A. If the will were construed according to the particular intent, the first devisee would take an estate for life only; and the words 'heirs,' or 'heirs of the body,' or 'issue,' must operate as words of purchase." 6 Cruis. Dig. 399.—Mr. Cruise thinks it an objection to this last construction, that the remainder to the heirs general would not embrace the whole line of heirs, (*supra*, 240.) and that though the remainder to the heirs special would take in all the heirs of that denomination, yet if the devisee had several sons, the first would take an estate tail, but none of the other sons would take *vested* estates, whilst the eldest or any issue of his body were in existence. But, if *intention* were the "pole-star," that construction must surely be the best which gives effect to the whole intention, as expressed in the will. Now it cannot be disputed that the intention is to give a particular estate of freehold only to the first taker, and a distinct remainder of inheritance to his heirs; and can there be a doubt that this intention would be most effectually consulted by permitting the heirs to take originally in their own right, to such an extent, and with such transmissible qualities, as the remainder to them might legally operate? Whence is this *general* intention collected? From the limitation to the heirs? The intention of that limitation is commensurate only with its legal operation. But if it expressed an intention more comprehensive than its legal im-

have contributed little towards disentangling the gordian knot.

port, considered as a distinct limitation, on what principle of *construction* can it be contended that it shall not be allowed to give effect to that intention so far as by law it may, but that the two limitations shall be knit together to the destruction of every intention apparent on the face of the devise? How the supposed objection that none of the other sons could take *vested* estates would be removed by causing all the issue to take by descent from the ancestor is not very obvious. It seems impossible to consider the rule as referable to the principle here stated. Mr. Cruise adds, that if the remainder was devised to the *issue* of A., the estate would vest in all his children, as joint tenants for life, and tenants in common of the inheritance, [without superadded words of limitation in tail] referring to Roe *v.* Grew, which does not appear to warrant any such position.

SECTION VII.

Of the Nature and Tendency of the modern Doctrine of general and particular Intention.

The phrase "general intention" has been employed by different Judges and Writers, in such various and opposite senses, that it seems to be a phrase of almost universal signification. It is sometimes used to express the intention that the estate shall not go over to those in remainder, but upon an indefinite failure of issue, or heirs of the body, of the first taker; (*a*) sometimes to describe, as the true ground or principle of the rule in Shelley's case, the comprehensive scope of a limitation to the issue, heirs of the body, or heirs general, of the devisee for life; (*b*) sometimes, with reference to the doctrine of *cypres* or approximation, to denote the leading intention of a devise which gives to a succession of issue, or heirs, aiming at the same time to restrict their estates in contravention of the rule against per-

(*a*) *Supra*, 61. 96. (*b*) *Supra*, 282. *n.h.* 3 Bro. P. C. 273.

petuities; (c) sometimes it occurs in speaking even of the intention to give an estate for life only to the first devisee; (d) and, lastly, in its largest sense, it expresses the ground or reason of any decision upon a devise, involving the construction or effect of such words as "heirs of the body," "issue," "sons," "children," &c. whatever that ground or reason may happen to be. (e)

The doctrine of general intention, as understood in the first of the above senses, will form the principal subject of enquiry in the present Section.

It is scarcely possible to frame any definition or description of the doctrine, applicable to the great variety of circumstances under which it has been judicially applied: but, in order that the reader may enter upon the inquiry with something like a distinct preconception of the subject, an attempt will be made to sketch its general outlines, which can only be filled up by an extended discussion of the decided cases.

Where a testator limits a particular estate, (as to A. for life) and introduces an ulterior disposition in terms which clearly indicate an intention to prefer the issue, or some line of issue, of the first taker, to the ulterior devisee, (as from and after

(c) *Supra*, 114. *n. h.* 3 Bro. P. C. 275. 5 Ves. 390.

(d) *Supra*, 152. *n. g.* (e) See 4 T. R. 300.

the decease of A and default or failure of his issue, or issue male, to B.,) either without expressly limiting any estates to such issue, or without limiting estates capable of excluding the ulterior devise until the happening of the event (*viz.* a failure of the issue contemplated,) in which alone the testator's bounty is designed to reach such devisee, the courts imply an intention to benefit the issue to the full extent of exhausting the issue or line of issue described; pronouncing *that* to be the paramount, or general intention, in respect of which the express intention to give the first taker a restricted interest, and the intention, either expressed or implied, to give estates in remainder to his issue as purchasers, constitute the secondary or particular intention. These intentions being deemed incompatible, inasmuch as the rule of law will not permit a limitation, either express or implied, to the heirs of the body, or issue indefinitely of the devisee for life, to exist as an independent remainder, and the rules of construction forbid the raising by implication of estates by purchase to the issue as objects specially designated (*i. e.* to first and other sons in tail, remainder to daughters, &c., or to all the children in tail, with cross remainders, &c.) the courts, on the principle of effectuating the testator's general or paramount intent, have frequently sacrificed the particular limitations (*i. e.* not only the express estate for life, but the express remainders to the children, sons, &c.) even though such remainders were capable of le-

gal effect consistently with the general intention; and raised an immediate estate tail to the first taker, by virtue of which the testator's bounty *might* be transmitted through the whole line of issue described; the law not presuming that the first taker will suffer a recovery, and defeat the general intention thus effectuated at the expense of the particular intention.

Thus in the case of a devise to A. for the term only of his life, and after his decease, to his issue, as tenants in common, but in case he should die without leaving issue, then, after his decease, over; (*f*) and of a devise to A. during the term of his natural life, and after his decease, to and amongst his issue, and in default of issue over; (*g*) without words to pass more than life estates to the issue taking as purchasers; (*h*) the courts have considered that the testator used the word "issue" in the gift as a substituted term for children, but that he also intended the limitation over to take effect only upon an indefinite failure of issue of

(*f*) Doe *v.* Cooper, *Supra*, 64.

(*g*) Doe *v.* Applin, 4 T. R. 82. *Infra*.

(*h*) In Doe *v.* Applin, the devise was of the testator's "freehold estates at A.:" but it was then questionable whether the word "estate," coupled with terms of locality, could be taken as descriptive both of the subject matter, and the interest. The same doubt existed in Pierson *v.* Vickers, *Supra*, 114. See 1 Sugd. Cop. 2 Ed. 312. where the cases upon the effect of the word "estate" in devises are collected.

A., who, in order to effectuate that intention, has been held to take an immediate estate tail, in exclusion of the express limitations to the children. So where the devise was to A. for life, and no longer, and after his decease to such son as he should have, without words of inheritance, and for default of such issue, over; (*i*) or to A., and after his death, to his first and other sons, without words of inheritance, and in default of male issue, over, (*k*) a similar construction has prevailed. In these cases, the express limitations to the issue might, it is conceived, have been preserved, by implying a limitation to the heirs of the body of the first taker, in remainder after those limitations.

But there is another class of cases, not falling within the terms of the above description, in which, notwithstanding that the Court have considered the devise as importing a gift to A. for life, with remainder to his children as purchasers, under the description of "heirs of the body" or "issue," and notwithstanding that there were technical words of limitation in fee, (*l*) or other words clearly

(*i*) Robinson *v.* Hicks, 1 Burr. 38. *Infra.* The word "estate" was sufficient to give the fee to the son: but as this circumstance passed without much notice, and as Sir J. Jekyll had decided that the son would take for life only, this case may be classed, as regards the doctrine in question, with those in which particular limitations to the issue, carrying less than the inheritance, have been sacrificed to the general intention.

(*k*) Wight *v.* Leigh, 15 Ves. 564. *Infra.*

(*l*) Frank *v.* Stoven, *supra.* 116.

sufficient to pass the fee to the children; yet the first devisee has been held to take an estate tail (m) on the ground of effectuating the general intention collected from a devise over in default of issue of that devisee. In those cases the Court has assumed to mould and recast the express limitations to the first taker, and to his children and *their* heirs general, into a gift to the first taker and *his* heirs special, so as to let in the ulterior devisee upon an indefinite failure of his issue, instead of referring the words "in default of issue" to the issue before specified, and construing the limitation over as a concurrent or alternative contingent remainder to take effect only if the limitation to such specified objects should not happen to vest.

The doctrine of general and particular intention has been incidentally touched upon in the course of the preceding sheets. As it has found its way into most of the cases on which we have been commenting, and is wrapt in some degree of darkness and mystery, it must not be allowed to pass without a strict examination which may tend perhaps to throw light upon its real nature and proper objects, and to restrain it within reasonable limits, which all such undefined doctrines are apt to overleap. There existed long prior to Robinson *v.* Hicks a principle which said that the primary substantial intent of an instrument should prevail against a subordinate immaterial intent:

(m) Doe *v.* Smith, *supra.* 96.

but this principle was applied in conformity to the maxim *ut res magis valeat quam pereat*, (*m*) and had never been used as an unsparing engine of destruction. The certificate (*n*) of the judges of the Court of King's Bench in the above case was understood solemnly to propound the doctrine in question as a rule of construction in devises, though neither the terms in which it was there laid down, nor its supposed application to the circumstances of that particular case, conveyed any definite idea of its nature; but succeeding judges were left at full liberty to interpret it in a more or less extensive sense, according to their different bent of genius, and course of education. (*o*) As other rules and principles of a more rigid and determinate character, which claimed only the humble merit of fixing the construction of express dispositions made by the testator, sunk into neglect, the doctrine in question grew up and flourished, till it seems to have attained its full vigour and maturity under the auspices of Lord Kenyon. But

(*m*) Plowd. Com. 344. And see Roe *v.* Archbishop of York, 6 East. 86.

(*n*) "We are of opinion that upon the true construction of the will of the testator George Robinson, Lancelot Hicks therein named must, by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail male, he and the heirs male of his body taking the name of Robinson, notwithstanding the express estate devised to the said Lancelot Hicks, for his life, and no longer." And, it should be added, the express devise to his son. See 2 Bligh. 32. *n.*

(*o*) *Supra*, 73. *n. c*

its prevalence in some of the decisions of the Court of King's Bench while his Lordship presided there, and in subsequent determinations, has been noticed with marked disapprobation by a great legal authority of the present day, as tending, under the pretext of consulting the general intent, to disappoint every intention which the testator ever had; and it will probably be applied more sparingly to future cases, where its admission to the extent in which it was laid down by Lord Kenyon would operate the destruction, not only of an express limitation to the first taker, but of express limitations to his issue as purchasers.

As Lord Kenyon appears to have professed himself the champion of this doctrine, and to have taken extraordinary pains to exhibit the great case of Robinson *v.* Robinson, or Robinson *v.* Hicks,(*p*) in what he conceived to be its true light, it is fit that his Lordship's statement of the principle, as extracted from the Reports of his Judgments, should be submitted to the reader.

"Robinson *v.* Robinson (observed Lord Kenyon,) (*q*) was sifted and considered more than any preceding case. That case was agitated for nearly half a century. It first came on in Sir J. Jekyll's time, and was not decided until after Lord Hardwicke had left the profession; and though the

(*p*) *Infra*, 303. (*q*) 8 T. R. 9.

latter *entertained some doubts* during its discussion in the House of Lords, he concurred in the unanimous opinion of the judges delivered by Lord Chief Baron Parker. By that case *this* position *was* clearly *established, that in the construction of a will we must first look to the general intention, and give effect to that; and if there be a secondary intention which interferes with it, we are to* RECONCILE THE WHOLE AS FAR AS WE CAN, *but at all events to give effect to the general intention.*" On another occasion (*q*) Lord Kenyon said, "the result of the cases is that the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to ONE (*r*) of the limitations, if a different construction would defeat the general intent." And in a later case, (*s*) his Lordship enforced the same principle. "It has been the settled doctrine of Westminster Hall for the last *forty* or *fifty* years, that there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect. I remember that point much discussed in the case of Robinson *v.* Robinson. I heard it argued the first time before a very great lawyer, Sir Dudley Ryder, who then presided in this Court. A second argument was directed: but he died

(*q*) 4 T. R. 88.

(*r*) This word *one* is printed in italics in the report, so that doubtless it was really used by Lord Kenyon.

(*s*) 1 East. 234.

before it came on. It was argued a second time before Lord Mansfield; and the certificate, which was afterwards returned upon the greatest deliberation, is in print. Nothing could be more positive than the words of the will in that case to shew a particular intent that the first taker should take an estate for life, and no longer. (*t*) But there was a general intent apparent, which could not be effected but by giving him an estate tail, and on that the decision was founded. The case was carried up to the House of Lords while Lord Hardwicke sat there, and was much considered by him; and questions were put to the judges upon it framed by him in every possible shape; and Lord Chief Baron Parker, who is known to have been a very strict lawyer, delivered their opinions agreeing with the judgment of this Court. The same question came on again to be considered in Roe d. Dodson *v.* Grew (*u*) in the Court of Common Pleas; and was there much canvassed, and underwent the same determination. Then came on the case of Doe d. Candler *v.* Smith, (*x*) in which I thought I could not make the matter more clear than by reading the words of Lord Chief Justice Wilmot in Dodson *v.* Grew."

Some of the determinations, which profess to found themselves on this rule of construction, appear to pay but little regard to that part of the

(*t*) And (it should be added) that his *son* should take as *persona designata.*

(*u*) 2 Wils. 323. *Infra.* (*x*) *Supra*, 96.

rule which enjoins us to "reconcile the whole as far as we can," and which prohibits the subversion of more than *one* limitation.

If it can be satisfactorily shewn (as I think it may,)—I. That this doctrine, as laid down and applied by Lord Kenyon, and occasionally by later judges, is absurd and mischievous. II. That no such doctrine is fairly deducible from those cases, which are commonly referred to as its principal, if not its original, sources. III. That principles of construction irreconcileable with this doctrine are established by other cases, whose authority has never been impeached. IV. That the doctrine has been abandoned by some of its own advocates, and rejected by the courts in several of the modern decisions. And, V. That it has been condemned by some of the highest legal authorities of the present day;—then it would seem to follow that it cannot be considered as a rule of construction "clearly established."

1. The conclusion to be drawn from the certificate of the judges in Robinson *v.* Hicks, and from the cases which have proceeded upon the principle so "anxiously inserted" (*u*) in that certificate, is (to adopt the words of Mr. Cox (*x*)) "that no general rule is laid down in the construction of words of this kind, but that courts, both of law

(*u*) 1 Cox's P. Wms. 542. (*u*) Doe *v.* Halley, *infra*.

and equity, consider the raising estates by implication, as depending upon such implication being *necessary to effectuate the general manifest intention* of the testator;"—without furnishing any definite principles to assist us in collecting that general manifest intention, or in deciding whether any and what implication is necessary to effect it; but resigning the whole "to that power" which a distinguished writer (*x*) has justly characterized as "most dangerous and most tremendous;"—the discretion of the judge.

The very end and object of law is to prevent

(*x*) Sir W. Jones' Law of Bailments, 3 Ed. 25. This writer, when he is about to controvert the opinion of Lord Holt, introduces that great Judge in these terms:—"Sir John Holt, whom every Englishman should mention with respect, and from whom no English lawyer should venture to dissent, without extreme diffidence, &c." *Ib.* 35. The author then proceeds to assign good reasons for his dissent. He does not think it enough to apply the epithets "old" and "strait-laced" to the opinions of grave and learned men. *Supra*, 83. Another passage in this work is so apposite to some of the doctrines discussed in the preceding sheets that I am tempted to quote it. "Nothing, said Mr. Justice Powell emphatically, is law, that is not reason, 2 Lord Ray. 911.; a maxim in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of Titius may, and frequently does, differ from the reason of Septimius, no man, who is not a lawyer, would ever know how to act; and no man, who is a lawyer, would in many instances know what to advise, unless courts were bound by authority, as firmly as the Pagan deities were supposed to be bound by the decrees of fate." *Ib.* 60.

the enjoyment of our civil rights from being frequered by the ever-variable shades of human opinion; and to exclude by positive institution the influences exerted on the strongest minds by the prejudices of education, the desire of change, the caprice of humour, and the pride of intellect. The law of England in particular is said to delight in certainty, and admits not of any proposition so unbounded as that which the doctrine in question aims to establish. The proposition amounts in effect to a legal recognition of the utmost latitude of discretionary interpretation.

Of necessary implication, indeed, of that degree of moral certainty which is required to disinherit an heir at law, the books enable us to form some precise notion:—but what constitutes that manifestation of general intention which affords ground for an implication subversive of the particular express dispositions contained in the will? We make no advances towards certainty when we are told that it is the main, the paramount, the ruling intention. Grant that two intentions are apparent on the face of the devise; that (for example) there is an express intent to make the first taker tenant for life, and to constitute his children purchasers, without words to pass the inheritance to them, and that there is also a manifest intent that the estate shall go to another on failure, and not till failure, of the issue male of the first devisee;—in what respect is the latter intention more general than the former,

except as it comprehends a greater number of objects, and a larger quantity of interest? But is its generality in those respects decisive evidence of its being the paramount and favourite intention of the testator? If the matter had been fairly explained to the testator, and he had been asked to which of these intentions, supposing that one must necessarily be rejected, he would wish the preference to be given, without stating to him more of the legal consequences of his assigning the preference to what is called the general intention than that the first devisee would take a larger estate than for his life, and his children no estates by purchase, it seems as reasonable to suppose that he would have answered,—"I mean those limitations to stand 'at all events,' whatever may become of the inheritance, and of the issue not expressly provided for; I do not intend the first devisee one jot more, nor the second one jot less, than I have here given;" as to assume that he must have said—"I mean to transmit the inheritance to all the issue of the first taker; and though I have omitted to provide for this object, and have anxiously provided for other objects inconsistent with it, yet I wish to be understood as having said nothing more than that such an estate shall 'at all events' be raised as will comprehend all the issue of the first devisee." But supposing him to incline in favour of the general intention, that inclination would most probably be counteracted by a full statement of the consequences that would

flow from the only legal mode of effectuating that intention;—by representing to him that the first devisee would take an estate tail, which, though it might amuse the issue with a chance of succession, would put them, and the remaindermen, in the immediate power of the first devisee, and enable him to appropriate the whole of the testator's bounty to himself. But admitting it to be in the highest degree probable that the testator would wish the general intention to prevail at all events, still we should not be warranted in sacrificicing, on any conjectual grounds, (*y*) the express to the implied gift. Nor is the whole force of the objection to Lord Kenyon's doctrine yet spent. Assuming the paramount intention to be established beyond a doubt,—is the construction which subverts both the express intents the result of a necessary implication? Might not a limitation to the heirs of the body of the first taker, in remainder after the express limitations to the child-

(*y*) "But if the issue cannot take as purchasers, they can only take by the estates being transmissible, for which purpose the ancestor must take a descendible estate; and, in thus making the particular intent give way to the manifest general intent, courts of justice do no more than the testator himself would *probably* have done, had he been apprised that his general purpose required him to give up his particular intent. But, in collecting the general purpose of the testator, the particular intent is *always* regarded; and if the one can receive effect without prejudice to the other, it is certainly the duty of courts of justice to allow it to prevail." 2 Fonb. Eq. 5 Ed. 58. *n*.

ren be implied, which would attain the end proposed, without excluding those limitations?

To exhibit a faithful delineation of the doctrine, another feature still remains to be more strongly touched. In some of the cases to which the doctrine has been applied, *implication*, in the proper sense of that term, was not only unnecessary, but *impossible*. Implication supposes a chasm or vacancy to be supplied, the omission of some connecting link in the chain of limitations: but where there are express limitations, which speak a coherent and perfect sense, and exhaust the whole inheritance, all implication is excluded. Thus in Doe *v.* Smith (*z*) the devise was to A. and the heirs of her body *for ever*, as tenants in common, with a limitation over in case of A.'s death before twenty one, or without leaving issue; and in Frank *v.* Stoven, the devise was to A. for life, remainder to the issue male of his body, *and their heirs*, with a limitation over in default of *such* issue. In both these cases the judges relied upon the words introducing the devise over as shewing a manifest general intention that the estate should not vest in the ultimate devisee until an indefinite failure of issue, or heirs of the body, of the first taker; an argument to which it was idle to resort unless they conceived that the limitation to the "heirs of the body" in Doe *v.* Smith, and to the

(*z*) *Supra*, 96.

"issue" in Frank *v.* Stoven, designated individual objects to take as purchasers. But as in the former case there were words which, though not strictly technical, were adequate to pass the fee simple to the children, (*a*) and in the latter case there were technical words of limitation in fee simple, it is clear that the whole interest was expressly disposed of, and that nothing was left for implication to supply. It can make no difference whether the express limitations describe the objects by their proper appellation, or by any substituted term; nor whether the inheritance is devised to them by formal or informal words. It is impossible to suppose that Lord Kenyon could have been ignorant of the sufficiency of the words 'for ever' to carry the fee.

In Pearson *v.* Vickers, (*b*) Mr. Justice Lawrence was in doubt as to the effect of the word "estate" coupled with words of locality: but if words adequate to pass the fee would have induced a different construction, it should seem that the Court was competent to determine, and was bound to determine, the legal effect of the word "estate" in that devise. In the same case Lord Ellenborough asked, "how do you get rid of the words in default of such issue?" The answer was natural enough: "the words 'such issue' refer to sons and daughters"—and it might have been

(*a*) *Supra*, 100. (*b*) *Supra*, 114.

fairly retorted, "how do *you* get rid of what you consider to be express limitations to those sons and daughters in fee simple?" Mr. Justice Lawrence said that the words "in default of *such* issue" were always construed to mean an indefinite failure of issue, unless restrained by other words. But where the previous express limitations distribute the entire inheritance amongst the children, the words "such issue" are reduced to mere words of reference to the particular objects of those limitations.

It is clear that in Frank *v.* Stoven, (*c*) the Court proceeded on the principle here stated, because they held that the circumstance of the limitation over in default of such issue distinguished the case from Doe d. Cooper *v.* Collis, (*d*) where, upon a devise to S. H. during the term of her natural life, and after her decease to the *issue* of her body, and *their heirs* for ever, *without any limitation over,* Lord Kenyon held that S. H. did *not* take an estate tail. It is remarkable that in Doe *v.* Collis, Lord Kenyon applies the phrase "general

(*c*) The question came before the Court upon a case directed by the Court of Chancery in a suit for the specific performance of a contract for sale, the purchaser objecting to the title, on the ground that B. F. the first devisee did not take an estate tail. B. F. had issue a son living at the time of making the will, and of suffering the recovery on which he rested his title. But the Court thought this circumstance did not vary the case.

(*d*) 4 T. R. 294.

intention" to the intention expressed by that devise, notwithstanding the absence of a limitation over; and proceeds to shew that this general intention will best be answered by allowing the word "issue" to operate as a word of purchase descriptive of children. It cannot but strike the reader that the distinction between these cases (Doe *v.* Collis, and Frank *v.* Stoven,) is extremely fine-spun.

DOE *v.* COLLIS.	FRANK *v.* STOVEN.
To S. H. during the term of her natural life, and after her decease to the *issue* of her body, and *their heirs* for ever, [no limitation over.] Held an estate for life in S. H. (*e*)	To B. F. for his life, sans waste, and with power to jointure, and after his decease, to the *issue* male of his body, and *their heirs*, and in default of *such* issue, over. Held an estate tail in B. F.

The Court may construe, transpose, and marshal, the words of the will; it may even supply a

(*e*) To state the case more fully; certain lands were devised in these words:—"To his daughters E. A. and S. H., *to be equally divided* between them, not as joint tenants, but tenants in common, *viz.* the *one moiety* to E. A., and her heirs for ever; and *the other moiety* to S. H. during the term of her natural life, and after her decease to the issue of her body, lawfully begotten, and their heirs for ever." Lord Kenyon said, that if the devise of the second moiety were construed to give an estate tail to that daughter, the devisor's *estate* would not be equally divided, for then the *ultimate reversion* of that moiety would be again *subdivided*, between the heirs of the two daughters, and the first daughter and her heirs would take a moiety of this reversion over and above what they took under the devise of the first moiety of the whole. This sort of reasoning is rather inconclusive. The words "equally to be divided" seemed to be naturally applicable to the subject-matter of the gift, and not to the interest; and they were besides merely introductory.

limitation in order to complete the sense, upon clear evidence of intention: but it has not the power, even if it had the inclination, to annihilate estates expressly created, and capable of standing consistently with a sound exposition of the will; it may expound, but it cannot erase, the written testimony of a lawful intention.

Such, therefore, appears to be the real character of the doctrine, when the veil of mystery which such terms as "necessary implication," "general intention," "manifest intention," &c. have thrown over it, is drawn aside.

II. The cases of Robinson *v.* Robinson, or Robinson *v.* Hicks, (*f*) and Roe d. Dodson *v.* Grew, are commonly referred to as leading authorities for the rule of construction which establishes the general intent of a devise at the expense of the particular intent. On examination, however, they appear to be referable to a different principle.

The first of these cases was, as we have seen, repeatedly cited in strong terms of approbation by Lord Kenyon. It is fit, therefore, that its merits should be fairly appreciated.

The testator devised his real *estate* to three persons, and their heirs, to the uses following, *viz.*

(*f*) Hanmer's Cases (from Lord Kenyon's Notes) 298. 2 Ves. 225. 1 Burr. 38. 3 Bro. P. C. 180.

to raise 1000*l.* towards paying for certain presentations; and after the 1000*l.* was raised, then he bequeathed all his said real *estate,* (excepting his estate in the parish of Endellyon, and his presentations,) to Lancelot Hicks, for the term of his *life,* and *no longer,* provided he altered his name, and took that of Robinson, and lived at testator's house at Bwchym; and after his decease, to such *son* as he should have, lawfully to be begotten, taking the name of Robinson; and for default of *such* issue, then he bequeathed the same to his (testator's) cousin William Robinson [testator's heir at law,] and his heirs for ever. And after willing that William Robinson might present whom he pleased to any vacancy in any of the testator's presentations during his (W. R.'s) life, and that in case any of his (W. R.'s) children should take, or be designed for holy orders, bonds of resignation should be taken to such child or children, if the vacancy happened before he or they attained such orders; and after the same should be disposed of as aforesaid, then he gave the *perpetuity* of the said presentations to the said Lancelot Hicks, in the same manner, and to the *same uses,* as he had given his estates.

Lancelot Hicks survived the testator. He had no son born at the testator's death, but had afterwards two sons, of whom the eldest died in his lifetime an infant, and the youngest survived him.

Sir Joseph Jekyll held that Lancelot Hicks took an estate for life in the testator's estate, (except Endellyon, and the presentations) with remainder to the eldest, and *but one son,* of Lancelot Hicks for *life,* with remainder to William Robinson the heir at law; and that the presentations were to go in like manner. Lord Talbot affirmed this decision on appeal. The point afterwards coming before Lord Hardwicke, he directed a case for the opinion of the judges of the Court of King's Bench, who certified that "Lancelot Hicks must, by *necessary implication,* to effectuate the manifest general intent of the testator, be construed to take an estate in tail male."—On the return of the certificate, after Lord Hardwicke had resigned the seals, the Lords Commissioners decreed in conformity to it. The heir at law appealed to the House of Lords. On his behalf it was strongly urged, (*g*) that this was the first case in which it had been held that the tenant for life took an estate tail by implication, in virtue of the connecting words "for want of *such* issue," when the default of issue, on which the implication was raised, was not general, but relative, by force of the word "such," to a particular antecedent limitation, and where that antecedent limitation was made to only one son of the tenant for life, without any collective description of his heirs male, or heirs of his body, *and without any words*

(*g*) 3 Bro. P. C. 184.

devising an inheritance to that son. But nevertheless all the judges were unanimous in opinion that an estate tail male vested in Lancelot Hicks, whereupon the decree of the Lords Commissioners was affirmed.

Though this decision underwent such repeated and anxious consideration, the force of the word "estate" does not appear to have attracted much observation. This word was clearly sufficient to vest the inheritance in the son of Lancelot Hicks. But admitting that the son taking by purchase would have taken only an estate for life,—was it consistent with the rules of law to strain and torture the words in order to let in the *implication* of a larger estate to the exclusion of the heir?

If we suppose the word "son" in this devise to have been considered as a designation of one individual son only, (and the language of the *certificate,* resorting to *implication,* certainly seems to negative the idea that the judges of the King's Bench interpreted that word to be *nomen collectivum,* signifying male descendants generally,) then all the rules of legal and grammatical construction stood directly opposed to the acceptation of the word "issue," as collocated with the relative word "such," in a more extensive sense. Nor could the construction be supported by simply expunging the word "such." For if we strike out "such," the words "for default of issue" will with more propriety be referable to the son, whose estate is

indefinite; than to Lancelot, whose estate is expressly for life, and no longer; and operate to give the son an estate in tail general, not tail male. By this construction two particular intents, (*i. e.* that Lancelot should take only for life, and that his son should take in remainder by purchase,) would have been wholly preserved; and the supposed general intent, (*i. e.* that the issue of Lancelot should take,) would have been in part effectuated, without disappointing any express intention, whereas the construction adopted actually destroyed both the particular intents altogether, at the same time putting it in the power of Lancelot to destroy the general intent; and if we apply the maxim "*qui facit per alium facit per se*," then the result will be, that the highest court of judicature in the kingdom, assisted by some of the greatest lawyers who ever dignified the seats of justice, entirely subverted the lawful intention of the testator. Now as it was manifest that the relative "such" presented an obstacle to the construction, and that the words "for default of issue," (omitting "such") pointed more naturally at the son, and contemplated, besides, a failure of issue as well male as female; it should seem that the above result was produced by first striking out the word "such" in order to let in the implication, next inserting the word "male" after the words "in default of issue" in order to coarct the implied estate; and, lastly, superadding the words "of Lancelot Hicks" in

order to make him the receptacle of this compound of implication and interpolation.

But if the true ground of this decision was that the word "son" comprehended all the male issue of Lancelot Hicks, and acted as a word of limitation, then of course Lancelot Hicks was tenant in tail under the rule in Shelley's case; and "implication" and "general intention" are put aside, or reduced to an unskilful mode of expressing the effect produced by that rule. That the construction was really founded on this principle may be inferred from several passages to be found in the books, and this inference is strengthened by the difficulty of supporting the decision on any other ground. When the case was first heard in the King's Bench, Sir Dudley Ryder, C. J., after observing that he defied any one, lawyer or not, to say with certainty what the testator intended, cited several cases to shew that the word "son" in the singular number might be a word of limitation; and in Doe *v.* Mulgrave, (*h*) Lord Kenyon himself said, that "the words 'first and every other son,' 'children,' or 'heir,' might be taken as words of limitation, where it was necessary to give them that construction in order to effectuate the intention of the devisor, as in Robinson *v.* Robinson." And in the reasons for the appellant in Chapman *v.* Brown, (*i*)

(*h*) 5 T. R. 323.

(*i*) 3 Bro. P. C. 273. (signed C. Yorke, J. Dunning.) And see 2 Barn. and C. 526.

the following passage occurs:—"It is too well settled to be now disputed, that where a man has an estate for life devised to him, even with the negative words "no more" or "no longer," or the like; yet if there is a subsequent devise in the same will to his heirs, or the heirs of his body, these last words are to be construed as words of limitation, and not of purchase; and will operate by force of the testator's *general intention* against his words, (*k*) and give an estate in fee or an estate tail to the ancestor, and not to the heir. Upon *this ground* it was that in the case of Robinson *v.* Hicks (the authority principally relied on for the defendants) when it was once resolved that the word 'son' in that will was used by the testator as a *word of limitation,* as *nomen collectivum,* as synonimous to heir of the body, it followed of course that it enlarged the estate for life before given to the father into an estate tail."

The learned editor of Gilbert's Law of Uses, in treating of the doctrine of general and particular intention, expresses surprise at the omission of Mr. Fearne to notice this case.—"The leading decision on this subject is Robinson *v.* Robinson, 1 Burr. 38. It is remarkable that, although Mr. Fearne refers to similar cases, yet he does not discuss this case, to which, on the contrary, Lord Kenyon never failed to advert in the many decisions that he made on

(*k*) Would it not be more correct to say "by force of the rule of law against the testator's express intention?"

this subject. I cannot account for Mr. Fearne's omission of it. Highly as the profession are indebted to the labours of this writer, yet one may be allowed to observe, that he appears, at least in some measure, to have confounded the cases under discussion with those which depend strictly on the rule in Shelley's case. The cases appear to be totally distinct." (*l*)

It is not, perhaps, an improbable conjecture that Mr. Fearne might have felt some difficulty in approving of that decision; and, notwithstanding the successful result of his efforts in refuting the doctrines of the Court of King's Bench in Perrin *v.* Blake, he might be disinclined to enter the controversial lists with the great judges who decided Robinson *v.* Hicks.

Whatever imperfections may be found to exist in Mr. Fearne's discussion of the learning of the rule in Shelley's case appear to have been produced by his treating the rule (to use his own epithet) as of an "amphibolous" nature, instead of attributing to it a distinct and decided character; and these defects are discoverable rather in the general conclusions which he has drawn respecting the extent and prevalence of the rule, than in the classification, or detailed examination, of the cases. He cannot, as I submit, be fairly charged with having mistaken the principle of the decisions to which the learned editor alludes.

(*l*) Sugd. Gilb. Us. 41. *n.*

It will appear, I think, on a little consideration that the construction of an estate tail in the first taker, adopted in these cases of general and particular intention, is ultimately referable to the rule in Shelley's case; and that the Court, in every instance in which it has resorted to that construction for the purpose of letting in the issue, has in effect acknowledged and confirmed the rule. For though the testator manifests an intention to benefit the issue, he clearly negatives, by giving an estate for life only to the first taker, the presumption of an intention to benefit the issue through him; and if it were consistent with the rules of law that the issue should take in any other mode than derivatively through their ancestor, the Court would be doing violence to the testator's intention, and gratuitously placing the issue at the mercy of the first taker—*velut agnum committere lupo*—by converting his tenancy for life into a tenancy in tail. To raise estates in remainder to the first and other sons successively in tail, with remainder to daughters, &c., or to the children as tenants in common in tail, with cross remainders in tail, would be to frame a new will for the testator. We have seen that such liberties are not allowable, even where there is an express remainder to the heirs of the body, with an express declaration that they shall take as purchasers. But no rule of *construction* presents any impediment to their taking originally in their own right an estate transmissible to all the heirs of the body of the tenant for life; and as by

allowing them so to take, the particular intent to give a life estate only to the first taker would not be broken in upon, while the general intent to embrace his issue would be as completely satisfied and better secured than by vesting an estate tail in the first taker, there could be no doubt respecting the propriety of giving that operation to the devise, if a positive rule of law did not prohibit the separate existence of such a remainder after an estate of freehold of the same quality in the ancestor. In the cases of which we are treating, the estate really implied, interpolated, or substituted, (for in some of the cases it is difficult to say by what means it found its way into the will) is, I apprehend, a remainder to the heirs of the body of the tenant for life, which implied, interpolated, or substituted remainder, instantly attaches in him, by force of the rule in Shelley's case; and thus it should seem that when it is said that the general intention over-rules the particular intention, this is merely a less accurate, (*m*) and less intelligible, mode of expressing the consequence induced by a rule of law, where the will has limited an express estate to A. for life; with an implied or constructive remainder to the heirs of his body. As it matters not, with reference to the application of the rule, whether the remainder to the heirs arise by express limitation, or by implication or construction, it seems calculated only to embarrass

(*m*) 2 Bligh 56.

our ideas to distinguish in terms between a devise to A. for life, remainder to the heirs of his body, and a devise to A. for life, remainder to his son, &c. and if he shall die without issue, over; by referring the effect of the first devise to the rule in Shelley's case, and of the latter to the doctrine of general and particular intention; since in both cases A. owes his estate tail to the influence of the rule in Shelley's case, *and to the impossibility which that rule introduces of giving effect to any part of the testator's presumed intention.* Into the propriety of the implication, or construction, which raised the limitation to the heirs of the body of the first taker, and which depended on the application of the ordinary rules of interpretation, it was not Mr. Fearne's business to enquire: but such a limitation *being in fact supplied, or created,* (no matter by what authority or by what means) the cases fell directly within the scope of his exception from his fourth class of contingent remainders. The truth is, that with respect to Robinson *v.* Hicks, and the case we are about to consider (Roe *v.* Grew,) it probably never occurred to Mr. Fearne that they were capable of standing on any other principle than the effect of the word "son" in the one case, and the words "issue male" in the other, as substituted terms for "heirs male of the body."

The case of Roe d. Dodson *v.* Grew, (*n*) on

(*n*) Wilm. 272. 2 Wils. 322. (1767.)

which Lord Kenyon also relied as a case of general and particular intention, appears likewise to fall short of establishing that doctrine. There the testator devised unto his nephew G. G. all his lands (naming and describing them particularly,) to hold the same unto him the said G. G., for and during the term of his natural life, and from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and for want of *such* issue male, then he gave all and every the aforesaid premises unto his nephew G. D., his heirs and assigns for ever.

The argument of Wilmot C. J., was to this effect;—"Here are two things intended, one an estate for life to G. G., another an estate in succession to all his sons in tail male *ad infinitum*. Can they both take place? If they can, they ought. If they cannot, then balance the two *intentions* against one another, and see which is the weightiest and most comprehensive, and give that effect. Courts substitute themselves in the place of a testator, and suppose the question to have been asked him; 'you have willed two things, which cannot both be obeyed exactly according to your will, and therefore one must yield to the other.' What must have been the answer? I wish to be obeyed in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one."

It must be obvious that the case here put by the learned judge, *i. e.*, a case where there is a clear intention to give to one for life, with remainder to all the heirs male of his body, is one which must entirely exclude all the reasoning of the learned judge; for the instant this intention is fixed, the rule of law determines the effect of the two limitations. The Court has no option. There are not two conflicting intentions, of which the Court is at liberty to prefer the one, and reject the other. If no rule of law interposed, both limitations might stand: but the rule, by uniting the limitations, destroys as well the general, as the particular intention. How is the general intent of the remainder to the heirs effected by a construction which gives to the objects of that limitation no estate at all, but transfers the bounty designed for them to another? But admitting that there are conflicting intentions, the Court cannot substitute itself in the place of the testator; it cannot act upon any ground so loose as a supposititious answer to a supposititious question. Nor would the question and answer, as framed by the learned judge, solve the doubt, for the question would still remain,—which intention did the testator regard as the principal, capital, weightiest, and most material?

"The will says that the remainder shall take place for want of such issue male. *Such*—what?

Issue male of the body of G. G., comprising and embracing every branch arising from him; not one, but all, the male issue derived from him."

But the intention to exhaust the male line seems to be as strongly evidenced without, as with, the words introducing the devise over.

"The word 'issue' as a word of limitation does not defeat the estate for life; for without fine or recovery, which is not to be presumed, an estate tail is only an estate for life."

But though the law may not presume that the first taker will exercise his power of barring the issue and remaindermen, it must be understood to acknowledge a substantial difference between the nature and incidents of a tenancy in tail and a tenancy for life.

The learned judge admits upon the authority of Mandeville's case, &c. that "heirs male of the body of A." operating as words of purchase take in all the issue male of A. as effectually as if they operated as words of limitation; and that when the estate once vests in the heir male of the body of A. by purchase, every other heir male of the body of A. may take by descent, because it is *quasi* an estate tail from A.: but he contends that the same consequence would not ensue as if the words "heirs male of the body" acted as words of limitation;

for "suppose (he adds) A. has a son, who dies in his father's lifetime leaving daughters, and A. has other sons, they can never take at all; for the second brother cannot take because he is not *complete heir*."

The law, however, is settled the other way. It is not necessary that the person to take by purchase under a limitation to heirs special should be the very heir.(*a*) But it was immaterial to consider whether the consequence would have been the same, or not, for the rule in Shelley's case forbade the taking by purchase in the case before the Court.

"But where the limitation is to the heir male of the body of A. no estate tail vests till A. dies; and if there are no trustees to preserve, &c. A. may *bar* (*b*) the remainders at any time, after the sons are born, as well as before; and a fine levied by his eldest son will not bar his issue if he dies before the father, because the issue will take by purchase, and not from his father."

This, it is conceived, is not a solid reason for converting the remainder to the heirs into words of limitation to the first taker. The remainder to the heirs would be contingent, indeed, till the death of the ancestor, and might be destroyed by him: but, unless he had the immediate vested remainder, the destruction of the life estate and contingent remainder would let in a stranger; and

(*a*) See 2 Jac. and Walk. 106. (*b*) *Supra*, 37, *n*.

though a fine levied by the eldest son in the father's lifetime could operate only by estoppel, yet there is a still stronger objection to the construction of an estate tail in the father, *viz.* that he *may* bar all the issue and remaindermen. These are the grounds on which the learned judge builds his argument. The simple question for the Court to decide appeared to be whether the words "issue male" were used in the gift to designate the immediate sons of the tenant for life, or to comprehend his issue male indefinitely? If in the latter sense, then it was in effect a gift to A. for life, remainder to the heirs male of his body, and the heirs male of the body of such heirs male; and Shelley's case was a direct authority for holding A. to be a tenant in tail male, notwithstanding the superadded words of limitation in tail male. (*o*) This is the point of view in which Mr. Fearne appears to have considered the case, for he does not once advert to this doctrine of general and particular intention. He notices the fact of there being no issue of the devisee at the time, which does not in this case appear to have been material.

The observations which fell from the other Judges refer the decision to the legal force of the word "issue" as a word of limitation.

Clive, J. said that too great regard had been paid

(*o*) Fearn. C. R. 141.

to the superadded words "heirs male of the body of such issue male." Bathurst, J. laid it down as a rule that where an ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. And Gould, J. observed that the word "issue" is used in the statute *De Donis* promiscuously with the word "heirs"; that the term "issue" comprehends the whole generation, as well as the word "heirs"; and in his judgment the word "issue" was more properly, in its natural signification, a word of limitation than of purchase.

It is, therefore, too much to say that either of these cases supports the principle of construction for which Lord Kenyon adduced them as clear and decisive authorities.

3. The doctrine in question is not consistent with a train of decisions, in which the raising of estates tail by implication has been deemed compatible with the preservation of the particular express limitations. In these cases, the testator, after proceeding far enough to indicate his purpose of entailing the estate upon the issue, or some line of issue, of the first taker, stopped short, and left the round of limitations requisite to carry the estate through the issue described in a course of strict settlement, incomplete. The Courts seeing the intention to intail, and to postpone the remaindermen till a failure of the issue contem-

plated, but having no authority to insert remainders in proper form, implied a limitation to the heirs of the body of the first taker, which implied limitation fell into its proper place, and without excluding or disturbing the antecedent devises, filled up the chasm occasioned by the abrupt termination of the express limitations to the issue, before the period marked for the commencement of the ulterior dispositions.

Thus in Langley *v.* Baldwin, (*p*) where a testator devised certain lands to his eldest son for life, without impeachment of waste, remainder to his grandchild J. S. for life, without impeachment of waste, with power to jointure, and after his death to the first son of J. S. in tail, and so on to the *sixth* son only, and then devised that if J. S. the grandchild should die *without issue male,* the land should remain to J. B. It was held that J. S. took an estate tail, because the express devise was not to all the sons, and the testator could not intend to exclude the seventh, and subsequent sons, who could only be let in by implying a limitation to the heirs of the body of J. S., after the limitation to the sixth son, which implied limitation might stand consistently with the previous express limitations. (*q*)

(*p*) 1 Eq. Ca. Ab. 185. 1 P. Wms. 759, 1 Ves. 28. (1707.)

(*q*) See 1 Hanmer's Cas. 64. in Lethieulier *v.* Tracy, *infra,* 348.

The same principle of construction was adopted in the Attorney-General *v.* Sutton. (*r*) The testator devised the Chequer Inn to his nephew T. S. for and during the term of his natural life; and after his decease, to the first son or issue male of his body lawfully begotten, and to the heirs male of the body of such first son; and for default of such issue, to the second son or issue male of the body of the said T. S. lawfully to be begotten, and to the heirs male of such second son lawfully to be begotten, for ever, subject to a proviso that the said T. S. or his assigns, and the heirs male of his body, should not do or commit any waste upon the premises, and should not impeach, question, or endeavour to defeat, &c. the payment of all or any of the annuities, legacies, and charitable bequests, in the said will; and from and immediately after the death of his said nephew T. S. *without issue male of his body,* or after the death of such issue male, he devised all the said premises to trustees for certain charitable purposes. T. S. suffreed a recovery, and died without issue. It was adjudged that T. S. took an estate tail; for as all the issue male which T. S. might possibly have, *viz.* his third, fourth, and every other son, were not expressly provided for by the will, the limitation after his death, without issue male, raised the same estate to him by implication, as if it had been limited to him, and his issue male in express

(*r*) 1 P. Wms. 754. 3 Bro. P. C. 75. (1721.) And see and consider Chorlton *v.* Craven, Append.

words. But it was not pretended that if there had been issue male of T. S., his estate tail would not have been liable to open and admit the express remainders to his first and second sons in tail male;—that those remainders would have been merged in the constructive estate tail vested in T. S. This appears clearly from the report of the case by Peere Williams, (s) who argued in favour of the estate tail, and who contended that by virtue of the words "after the death of the testator's nephew without issue male of his body," an estate tail was created in T. S., and that in case he had issue a son, then that estate which was before closed in him, should open to let in such first son to take; and compared it to Lewis Bowles's case, (t) where the limitations were to the intended husband and wife for their lives, remainder to their first and every other issue male in tail male, remainder to the heirs of the body of the husband and wife, who were adjudged to take an estate tail executed *sub modo*, *i. e.* upon the birth of a son the estates would divide, and let in the remainder to him.

And in Allanson *v.* Clitherow, (u) (which, however, was the case of an executory trust,) real estate was devised to trustees, their heirs, &c. to raise maintenance for testator's son, till he attained twenty-three, and when he attained twenty-three,

(s) 1 P. Wms. 759.
(t) 11 Co. 80.
(u) 1 Ves. 24. Belt's Suppl. 24. (1747.)

to *convey* to him, his heirs and assigns, subject nevertheless to such *settlement* as after mentioned; and if he married a gentlewoman with a suitable fortune, the trustees to *settle* a jointure rent charge on her, and subject thereto, on the issue of *that* marriage, in strict settlement, as counsel should advise. But if his son died *without issue* of his body lawfully begotten, he gave the said real estate to his nephew C. C. for life, then to trustees to support contingent remainders, then to the first and every other son in tail, they changing their names to A.; and in default of such issue, to the testator's right heirs for ever. By a codicil, the testator, after reciting that he had given his lands to his son for life, remainder over, gave him power to dispose of any part thereof: but the money thereby raised to be paid to the trustees to lay it out in a purchase, and settle it in the same manner. One of the questions was, whether the son was entitled by the words introductory of the devise to C. C. to have an intermediate remainder in tail general, after the particular limitations precedent to C. C.'s estate? Lord Hardwicke was of opinion, upon great consideration, that there must be such an intermediate remainder in tail, after the strict settlement; for the estate would not otherwise be preserved in the channel intended by the testator. He would take it for granted, that under the direction to settle, connected with the codicil, the son was to be tenant for life expressly: and then the question was, whether the subsequent words, "if he die without

issue," were sufficient to give him an estate tail by implication. The issue of the marriage only was provided for: so that if the first wife died, any issue by an after taken wife would be excluded, contrary to the intent of the testator, unless some benefit arose to them under the last clause; and there was the same inconvenience as in Langley v. Baldwin. It was objected, said his Lordship, that this construction would give the son a power to suffer a recovery, and bar the limitation to C.: but there was no help for that; for if the will was so framed, as that the Court could not restrain such common recovery, which was a consequence of law, without contradicting the testator's intention as to the channel of descent, the law must take its course. (*y*)

(*y*) Other questions arose in this case. One was, whether, in the event which had happened, of the son's attaining twenty-three unmarried, the fee was to be conveyed to him. Lord Hardwicke thought not, and that "heirs" meant heirs of the body of the son, and that the codicil put it beyond all doubt. It was objected that no inconvenience would arise from the want of a limitation to the heirs of the body of the son, for that the trustees might execute the power *toties quoties*, and that "gentlewoman" was *nomen collectivum*. But *that*, Lord Hardwicke said, could not be, according to the construction of powers, which could be executed but once, unless the words imported otherwise; although it might be executed on a second wife, if not done before. Adverting to the executory nature of the trust, and the latitude which equity assumes in the execution of such trusts, moulding the limitations so as best to serve the presumable objects of an intail, it may, perhaps, admit of some doubt whether the settlement should not have been extended to the first and other sons, &c. by any after taken wife. The case is rather obscure. See Sugd. Pow. 436.

In a subsequent case before Lord Hardwicke, Lomax v. Holmeden, (z) lands were devised to C. L. (testator's son) for life without impeachment of waste; then on trust to preserve contingent remainders; and after his decease, to the first son of the body of C. L., lawfully begotten, and the heirs *male* (a) of the body of such first son; and for want of such issue to [*the* omitted] second, third, and fourth [sons,] lawfully begotten successively, in remainder one after another; (without words of inheritance) and for *want of such issue,* to the use of testator's four daughters and grandson, their heirs and assigns for ever. C. L.'s first born son died in the testator's lifetime without issue, after which another son was born, who survived the testator. Two questions were made:—1. Whether this second born son could take as *first* son of C. L. 2. If he could *not,* then whether he might not take an estate tail under the remainder to the second son by applying the words "such issue" to the issue of his body. It was determined upon the first point: but upon the second point, Lord Hardwicke inclined to think the second born son might by that limitation take an estate tail: at least he thought a great deal might be, and had been said, reasonable to maintain it from the omission of the article *the,* and the short phrases used by the testator; and from

(z) 3 P. Wms. 176. 1 Ves. 290. 3 Burr. 1576. (1749.)
(a) So in P. W. only.

the latitude which might not unnaturally be taken in expounding the word "successively," *secundum subjectam materiam,* as that word is capable of a larger meaning, particularly when applied to an estate in a family, and especially from the subsequent words in the limitation to the daughters upon the death without issue; for they must be referred to the issue of some person. Nor had the testator said, in words, whose son the second, third, and fourth should be; nor for want of whose issue the limitation over was to arise, which therefore should be supplied.

The next case is Stanley *v.* Lennard, (*b*) before Lord Northington. It arose upon a devise to trustees in fee, upon trust to permit S. L. the eldest of testator's two natural children to receive the rents for his life; and after his decease to permit the eldest son of S. L., and the issue male of such eldest son, to receive the same; and *for want of issue of the said S. L.* to permit testator's second son, &c. And testator directed that his son S. L. should have the use of testator's pictures for his (L. S.'s) life, and after his decease to his issue, and the issue of his issue; and for default of issue of S. L., then to T., &c. S. L. died, leaving one child a daughter; who claimed an estate tail under the will. Lord Northington observed, that where a testator makes a man tenant for life, with remainder to one, two,

(*b*) 1 Eden 87. (1758.)

three, &c. of the issue of the tenant for life, and then for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life, by necessary implication; and this because of the word "then" before the limitation over, which though sometimes an adverb of time, yet is sometimes a word of relation, and signifies as much as "in such case;" and must have this effect, that upon the first, second, third, &c. limitations failing, the remaindermen could not take it, because of the words "for want of issue;" and, therefore, unless the tenant for life was construed to have an estate tail, it would descend in the mean time to the heir at law, because the contingency on which the remainderman was to take had not happened. Then as to the will before the Court,—how could he say that he must not give an estate tail to S. L.? The words said so;—the clause relating to the pictures confirmed it. It was argued that all the sons of S. L. should take an estate in tail male, and then the words should stop: but that he could not do.

The case of Evans d. Brook *v.* Astley, (a) is sometimes referred to as a case of general intention. The testator devised all his manors, &c. unto S. D. his godson, and son of C. D., of M., during his natural life, and the heirs male of his body, lawfully to be begotten; and for want of such issue, to C. D., another of the sons of the said C. D., of M., during

(a) 3 Burr. 1570. (1764.)

his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, to J. D., another of the sons of the said C. D., of M., during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, then, *to every son and sons* of the said C. D., of M., which should be begotten on the body of his then wife: and *for want of such issue*, then to W. H., during his life, and the heirs male of his body, lawfully to be begotten; and for want of such issue, then to S. G., for his life, and the heirs male of his body; and for want of such issue, then to J. G., during his life, and the heirs male of his body; and for want of such issue, to the right heirs of the testator. And the testator annexed a condition, that if the estates so devised to S. D., and others as aforesaid, should come to him or them, then he or they, *and their descendants*, should take the testator's surname of D., and bear his arms. There were powers to make leases; and *jointures*. S. D., C. D., and J. D., the three sons of C. D., of M., all died without issue. But C. D., of M., had a fourth son, W. D., born after the date of the will; who took the name and arms of D., and suffered a recovery, and made his will, under which will the defendants claimed. The question was what estate W. D., the fourth son of C. D., of M., took, under the will? Lord Mansfield said;—"Nobody can doubt of the *intention* of the testator. It is too strong, to suppose that he meant nothing to the after born sons.

The words of the will make them indeed joint tenants: but that could not be his intention, for this testator had manifestly a pride in his family. Then there is a power to make jointures. What, are there to be six or seven jointures, all at once? It must, therefore, be admitted, that they are to take in succession. If so, the other circumstances must be taken in, to shew what estate he meant to give them. And there can be no doubt, but that he meant them an estate in tail *male*. Though the will is written with the testator's own hand, he probably copied it from a draught; and he seems, by mistake, to have omitted some words which were inserted in the original draught. I never had the least doubt but that the testator intended the same estate to those after born sons, by *analogy*, as he had given to the prior born. Wilmot, J.—"'For want of *such* issue,' means 'for want of heirs male of the body;' and this is the true construction."

Lord Kenyon said, (*d*) that in determining Evans *v.* Astley, the Court considered the rule adopted by Lord Hale, *noscitur a sociis*, which was no pedantic or inconsiderate expression, when falling from him, but was intended to convey, in short terms, the grounds upon which he founded his judgment;—that the kindred terms to which the Court referred were the limitations to all the other brothers; and a requisition that the

(*d*) 3 T. R. 87.

devisor's name and arms should be borne by them and their descendants, and that the devisor could not be supposed to have intended that the estate, which was the substance, should go one way, and the name and arms, which were the shadow, another.

The next case of this class, Doe d. Bean *v.* Halley, (*e*) was decided by Lord Kenyon, and is deserving of particular attention. The testator devised the premises in question to his "nephew M. H., and his assigns for and during the term of his natural life, without impeachment of waste; and, from and after his decease, to the eldest son of his said nephew M. H. lawfully to be begotten, and to the heirs of such eldest son, upon condition that such eldest son be christened and called by the name of F.; and *in default of issue male of his said nephew,* unto his nephew S. B., (the lessor of the plaintiff) and his assigns for his life, without impeachment of waste; and from and after his decease, to his eldest son, lawfully begotten, or to be begotten, and his heirs, provided such eldest son be christened and called by the name of F., and for want of such issue, to his (the devisor's) own right heirs." M. H. suffered a recovery and died, without having had any issue male, leaving the defendant his heir at law. Lord Kenyon, adverting to Robinson *v.* Hicks, said that the particular intent in that case being inconsistent with the de-

(*e*) 8 T. R. 5. (1798.)

visor's general intent, which was that the whole line of male heirs of Lancelot Hicks should take, the Court thought that they ought in *conscience*, and in law, to effectuate that general intent. "That case (continued his Lordship) was a stronger case than the present; for by our decision here we shall not violate any particular intent of the devisor. Here the limitations are to M. H. for life, remainder to his eldest son, and his heirs, (in fee, it is said by the plaintiff's counsel, but to that I do not agree,) and in default of issue male of M. H., then over. But, in deciding this case, *I will not abandon the general rule recognized and acted upon in Robinson* v. *Robinson.* We have our *choice* of two constructions to effectuate the devisor's general intent, either to give an immediate estate tail to M. H., which would violate the particular intent of the devisor; or (and to which construction I incline) to say that M. H. took an estate for life only, remainder in tail to his eldest son, *remainder in tail to the father,* in order to let in all his issue male. And though the father could not bar the estate tail to his eldest son by suffering a recovery, yet by coming in as a vouchee under a double voucher, he might bar all the remainders over. I have considered this case to the utmost; and am of opinion that this recovery barred the remainders over, and that the defendant is entitled to our judgment." Ashhurst, J. said, it was argued that M. H. having an express estate for life given, it should not be enlarged by implication: but the cases of Robinson *v.* Robinson, and Bam-

field *v.* Popham, (*f*) seemed to negative that proposition; and had brought the *rule of law* back to its *natural channel*, namely, the *general intention* of the testator, and freed it from the fetters of *technical* rules. Grose, J. doubted whether M. H. took an estate tail in the first instance, because that would have enabled him to defeat the limitation to his eldest son; and therefore he agreed with Lord Kenyon that the way to *give effect to every part of the will*, was to decide that the father took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, so that any children that M. H. might have had even by a second *ventre* might have taken. And Lawrence, J. thought that the reasoning in the cases of The Attorney-General *v.* Sutton and Langley *v.* Baldwin went a great way to decide the present case, and that the case of Allanson *v.* Clitherow bore some resemblance to it.

It is difficult to reconcile this determination with the doctrines advanced by Lord Kenyon in other cases. The Court did in fact "abandon the general rule recognized and acted upon in Robinson *v.* Robinson," so far as that rule had been understood to warrant the destruction of the particular limitations; and proceeded on the older and better rule of giving effect, if possible, to every part of the will.

(*f*) *Infra*, 342. This case was against the implication of an estate tail.

The construction adopted in the case of Wight *v.* Leigh (*g*) does not seem exactly to accord with the principle of the above determinations. In that case (according to the report) all the testator's real *estates* in E. and S. were devised to her husband, J. C., in case he survived her, during his life; and after her husband's decease, she gave the said S. *estate* to the plaintiff; and *after his death,* she gave the same to *his first and other sons;* and *in default of male issue,* then she gave the said estates unto the eldest and other daughters of the plaintiff, and to *their heirs male* for ever, on condition they should take the name of W. and no other. The plaintiff, who had a son and three daughters, claimed an *immediate* estate tail. On the other side it was contended that by giving the father an estate tail, the Court would expunge the limitation to the first and other sons, which was a *descriptio personæ,* as much as a limitation to an existing son by name; pointing also to that order, in which estates are usually limited, with a view to succession, according to priority of birth; and that the words "in default of issue male," might be applied not to the plaintiff, but to the immediate antecedent, the first and other sons; a construction more grammatical, more consistent with the general plan of the devise, and approaching as near as could be to the ordinary language and course of settlement. But the Master of the Rolls held, that the plaintiff took

(*g*) 15 Ves. 564. (1809.)

an immediate estate tail. He said that the evident intention of the *testatrix* was to prefer all the male issue of *somebody*, either of the plaintiff, or of his first and other sons, to the daughters: but she had not given such an interest to any one, as would enable male issue generally to take; for all that was given to the plaintiff was what amounted in law to an estate for life, and so it was with regard to the estates given to his first and other sons. It was necessary, therefore, in order to effectuate the general intention in favour of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take, which could only be by giving an estate tail either to the father, or to his first and other sons. The male issue intended must, he thought, be the male issue of the father, not of the sons. Nothing was before mentioned of any issue male of the sons; whereas there was a certain description of male issue of the father before spoken of, *viz.* his first and other sons. (*a*)

The value of a decision is always in some degree lessened when the authorities which bear upon the point are not brought under the consideration of the Court; and other authorities not so immediately applicable are adduced. The only cases cited were Robinson *v.* Hicks, Doe *v.* Applin, and Seward *v.* Willock. There was in this case a clear intention to fix the estate in the family,

(*a*) See Mellish *v.* Mellish, App.

and (as I submit) to effect that object by constituting the first taker tenant for life only, (the words "after his death" marking the duration of his estate) and his first and other sons tenants in tail male in succession. The daughters were certainly designed to take estates in tail male as purchasers. As the words "in default of male issue" were not applied to any particular person, they were referable in grammatical construction to the last antecedent "first and other sons;" and as that construction was clearly best adapted to effect the intention, there seemed to be no sufficient reason for departing in this instance from the strict rules of grammar. The argument that the issue intended must be the issue of the father, and not of the sons, because there is no previous mention of issue of the sons, whereas issue of the father, *viz.* his first and other sons are before spoken of, solves the doubt by adducing the very circumstance which raises it. The default of issue might, perhaps, have been applied, with less violence to the words and the intention, to both father and sons, so as to have construed it a devise to the father for life, remainder to the first and other sons successively in tail male, remainder to the heirs male of the body of the father, remainders over. In Doe *v.* Halley, the default of issue male, which was there expressly referred to the devisee for life, necessarily reduced the estate devised to the son and his heirs to an estate tail. If in the case under consideration, the default of issue was referable to

the father alone, still as the word "estate," though coupled with a local description, and notwithstanding that the devise to the sons, was not immediate, (h) was sufficient to give the fee simple to them; and as the estate could not be carried over on failure of issue male of the father unless the sons were restricted to estates tail, it should seem that the Court would in this view of the case have been warranted in adopting a construction similar to that which obtained in Doe v. Halley. But admitting that the default of issue was restrained to issue of the father, and that life estates only were given to the sons,—might not the Court have implied a limitation to the heirs male of the body of the father in remainder after the devise to the sons, so as to give some effect to all the words of the will? The rules of grammatical and legal construction appeared adverse to the enlargement of the estate of the devisee for life, to the exclusion of the remainder to the sons. If we apply the principle laid down by Lord Hardwicke in Lethieulier v. Tracy, (i) and read the devise as if the words which raise the implication were turned into a limitation, the case will bear some resemblance to Doe d. Phipps v. Lord Mulgrave, (k) where the testator devised his estates real and personal in these words—"in trust to T. Lord L. for my first and every other son in tail male, failure of such issue, *to my brother Henry, and his first and every other son in tail*

(h) Forr. 162. (i) *Infra*, 345. (k) 5 T. R. 320.

male; failure of such issue to my daughter A. E. C. P. and her first and every other son in tail male; and in failure of such issue, to her eldest daughter, and her first and every other son in tail male; failure of such issue to her daughters respectively in succession; failure of such issue to the daughters of the last surviving Lord M., in all the foregoing cases without impeachment of waste other than wilful." And he declared his will to be "that the money lodged at Child's to pay for the purchase of the L. rectory, be applied to that purpose as soon as Sir J. S. can complete the title, and the renewals to be made by the *tenant for life*." And he named "for the executors in trust of that his will, Mrs. A. J., his brother H. P., or whichever of his brothers might *succeed* to the estate," &c. The question was, what estate Henry took. It was held that he was tenant for life only, with remainder to his first and other sons in a course of strict settlement, with remainders over.

The above cases (with the exception, perhaps, of Wight *v.* Leigh, so far as regards the exclusion of the sons,) appear to concur in establishing principles by no means favourable to the doctrine under consideration. They do not countenance the destruction of estates by judicial exposition, nor the raising by implication of estates in no wise analogous to the nature and presumable object of the express limitations. They were all marked by circumstances more or less favourable to the im-

plication of an estate tail. The testator had manifested an intention to put his estate in a course of strict settlement; he had made some progress towards the execution of that intention, but had evidently fallen short of accomplishing his purpose; he had evinced an anxiety for the devolution of the estate in a particular line, and betrayed the hereditary pride of the descendant of an ancient house, or the vanity of a would-be founder of a new one, by imposing the condition of taking his name and arms, or by other marks of real or assumed family importance. But the construction of Lord Kenyon in Doe *v.* Cooper, and other cases of that class, (*l*) struck the particular limitations

(*l*) It is needless to multiply examples: but it may be proper to notice that in Doe *v.* Burnsall, (*supra*, 142. *n. c.*) Lord Kenyon agreed that the limitation to M. O. was for life only, and the limitation to her children was to them as purchasers; and that if it had been shewn that the children could take only for life, then, according to Roe *v.* Grew, the Court would have endeavoured to convert the estate to M. O. into an estate tail, to effectuate the intention of the devisor: but the Court thought there was enough in that will to carry the fee to the children. And in Doe d. Blandford *v.* Applin, 4 T. R. 82. (1790.) which has been already alluded to, the testator gave and bequeathed in these words "unto my nephew W. D. all that my freehold estate that I bought of Mr. K. situate at A., to hold to him during his natural life, and after his decease *to and amongst his issue*; and in default of issue, to be divided between my nephew E. D., and my niece M. D., and to their heirs and assigns for ever." Lord Kenyon, C. J.—"In the first clause the estate is expressed to "be given to W. D. only, during his natural life: but in the next limitation it is to go to his issue; and in default of issue only

out of the will, and raised an estate in the first taker, without, it should seem, one single circumstance to go over: it is clear, therefore, from the whole of the will, that the devisor *did not intend that it should go over to those in remainder until after a general failure of issue in W. D.* Now I think we are warranted by many determinations, and particularly by that of Robinson *v.* Robinson, to give that effect to the will which will best answer the devisor's general intention, though by so doing we may defeat some particular intent. It has been argued by the plaintiff's counsel, that W. D. took only an estate for life, and his children an estate tail: but it would be *difficult to put two different interpretations on the word issue;* and, even if that could be done, it would not further the intention of the devisor in this case; for there are no cross remainders to the children, and they can never be implied." Buller, J.—"I am not inclined to differ from my lord in the construction which he has put upon this will, though I think by so doing we shall *go farther than has ever been done in any of the former cases;* because, in order thus to construe the will, we *must reject the words* 'and amongst.' But if we were to give effect to those words, it would defeat the general intent of the will, which will be better effected by giving an estate tail to W. D." Grose, J.—"Upon the *mere words,* I should think that W. D. took only an estate for life; and yet if we were to put that construction on the will, it would defeat the general intention of the devisor, which can only be carried into effect by considering "issue" as a word of limitation."

Lord Alvanley intimated a doubt as to the propriety of the rejection of the words "and amongst." 1 Bos. and P. 221. But upon the citation of this case in Doe *v.* Halley, 8 T. R. 7. n. Lord Kenyon said that he was still most clearly of the same opinion that he was when the case was determined. The principle on which Lord Kenyon professed to found his judgment *did* in fact impose two different interpretations on the word "issue," for he considered "issue" in the gift to be a word of designa-

stance from which an intention to intail could fairly be inferred; nay, under circumstances which apparently led to a contrary inference. The estate was devised (reading the will according to his Lordship's translation of the words of gift) to all the *children* equally. Grant that the testator had given life estates only to the children, and that he intended all the issue of the first devisee to take before the remainderman, yet those life estates might have been preserved, and the general intention satisfied by implying an estate in remainder to the heirs of the body of the tenant for life. It may be said, perhaps, that this would have been vain if the first taker had no issue born, since he might have destroyed those contingent life estates: but the law looks to the continuance, and not the destruction, of estates; and to urge that the retention of the gift to the children as tenants in common for their lives would have been repugnant to the nature of the implied estate would be to furnish a powerful argument against implying an estate tail at all. That under a devise to the child-

tion; and in the clause introducing the devise over, to mean issue indefinitely,—else why lay the emphasis upon that clause? If there had been no such clause, Lord Kenyon would probably have been of opinion that the children of W. D. took estates by purchase. *Supra*, 302. If the generality of the words "in default of issue" was the only obstacle to prevent the children from taking as purchasers, it was surely less difficult to supply the word "such" (in default of *such* issue,) than to reject the word "amongst." The word "estate," as collocated in this will, would now be held sufficient to carry the fee.

ren indefinitely, without words to carry the fee, the children would take life estates only, is the consequence of a rule of law which contravenes the intention of the testator. The *intention* of the devise, as read by Lord Kenyon, clearly is that the children shall take the absolute interest, and that the words introducing the devise over on failure of issue shall be understood as referable to a failure of children only, on whose coming into *esse*, the fee would vest, to the exclusion of the ulterior devisees. The doctrine, therefore, as applied even to those cases, where the children, if allowed to take by purchase, would take for their lives only, cannot be said to effectuate any *intention*, general or particular, express or implied. If the testator had been told that life estates only would pass under the words used by him, it is more than probable that he would have added words of inheritance; it is in the highest degree improbable that he would have converted the whole disposition into a gift to the first taker in tail. The Court has no power to supply the words of inheritance, though the intention so strongly requires it: but though it cannot do this, yet, according to the doctrine in question, it can destroy all that the testator has done towards effecting his object, and direct the estate into a channel of succession altogether repugnant to the scheme of his will.

It does not follow as of course from words introducing a devise over on failure of issue of some

of one of the preceding devisees, that an estate tail by implication shall be raised, although such words be preceded by limitations in tail which might eventually fall short of exhausting the whole line of issue of such devisee or devisees; for if the testator appear to have carried on the limitations to that point at which he may reasonably be supposed to have considered his object as attained, the words "in default of issue," &c. will be referred to the determination of the previous devises.

The case of Bamfield *v.* Popham, (*m*) appears to warrant a distinction of this nature. There the testator devised certain lands to trustees and their heirs, in trust for B. for his life, and after his decease, in trust for his first son, and the heirs male of his body, and after the decease of the first son, without heir male, then in trust for such other son and sons, and their heirs male, as should be begotten by the said B. in seniority one after another; provided that *if the said B. should die* before he came to the age of twenty-one years, or at any time thereafter *without issue male,* lawfully begotten of his body, that then the trust so limited to the said B. should be utterly void; and in such case, *from and after the death of the said B. without heir male* by him lawfully begotten, the trustees were directed to stand seised to the use of C., and

(*m*) 1 Eq. C. Ab. 183. 1 P. Wms. 54. 760. 2 Vern. 427. 449. (1702.)

his heirs. It was resolved that here being an express estate given to B. for life, with remainder to his first and *every* other son, &c., the words "if he should die without issue male" should not enlarge this estate for life into an estate tail, but meant no more than if he should die without *sons*.

The propriety of this decision, indeed, has been questioned, (*n*) and one of the positions laid down by the Court, *viz.* that an express estate for life shall not be enlarged by implication was clearly untenable: (*o*) but the case received great consideration, and is cited without disapprobation in subsequent cases by Lord Hardwicke, (*p*) and other judges, who distinguished it from Langley *v.* Bald-

(*n*) "The circumstance of the testator's having limited an estate in tail male to the first and other sons of the devisee for life might, *in the event* which had happened, render it unnecessary to enlarge the estate of the devisee for life: but the construction of a will is not to vary with the events. Suppose, therefore, that the eldest son of the devisee had died in the lifetime of the testator, the devise to him would have lapsed, and his issue male would consequently have been excluded from taking under the will. White *v.* White, 1 Bro. Cha. Rep. 215. See Ambrose *v.* Hodgson, Dougl. 340. Denn *v.* Bagshaw, 6 Term Rep. 512. But the limitation over was not to take effect while there was issue of the devisee for life; an intention which, with reference to the above *possibility*, could only receive effect by enlarging the estate of the devisee for life. The case of Bamfield *v.* Popham must, therefore, as it seems to me, be allowed to be a decision against the general intent in order to effectuate the particular." 2 Fonb. Eq. 58. *n.*

(*o*) See Blackburn *v.* Edgley, *infra*, 344. 8 Mod. 260.

(*p*) 1 Ves. 26.

win, and cases of that class on the ground that the testator had filled up by the express limitations the measure of his intention. It is laid down by Raymond, C. J. (p) that where an estate for life is devised to one, with a provision immediately for all his sons successively, and if he die without issue, remainder over, in such case the devisee has but an estate for life, because these words "if he die without issue," shall be intended a dying without such issue as are expressed in the will; and upon this distinction, he adds, the case of Bamfield v. Popham, was adjudged. (q)

And in a subsequent case, Blackburn v. Edgley, (r) where a testator devised his freehold estate to trustees in trust to *convey* to H. E. for life, without waste, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to his daughters in tail general as tenants in common, with power to H. E. to make a jointure; *and if H. E. should die without issue*, then he devised, &c. It was argued that H. E., by virtue of the words "if he die without issue," should have an estate tail; for that otherwise the daughters of his son could never take, which would be against the testator's intention. But Lord Chancellor Parker, though he exploded the notion that the words of

(p) 8 Mod. 260.

(q) See also Gro. Eliz. 16.

(r) 1 P. Wms. 600. (1769.)

implication should not turn an express estate for life into an estate tail, and was clear that a devise to A. for life, and if he die without issue, to B., gives A. an estate tail, held that here being a limitation upon H. E.'s death to his sons, and after to his daughters, the words "if H. E. should die without issue," must be intended "if he should die without *such* issue;" and it did not appear that the testator intended the daughters of H. E.'s sons to take, for he might think that on H. E.'s dying without issue male, his name and family would be determined, for which reason he might limit it over to the daughters of H. E. himself. This, it will be observed, was the case of an executory trust, which authorised the Court to mould the limitations so as to give full effect to the intention.

In the case of Lethieullier *v.* Tracy, (*s*) before Lord Hardwicke, the failure of issue was restricted to the decease of the first taker: but the case is worth noticing on account of the principle laid down by the Court as applicable to the construction of devises of this nature. It arose upon a devise of all the testator's manors, &c. to his daughter M. D., during her natural life; and from and after the determination of that estate, to trustees, and their heirs, during her life to preserve contingent remainders; and from and after the decease of his said daughter, to the first son of her

(*s*) 3 Atk. 774. 784. 1 Hanmer's Cases, 56. Amb. 204. 220. (1754.)

body, and to the heirs male of the body of such first son; and for default of such issue, to the second, third, fourth, fifth, sixth, and every other son of his said daughter, lawfully to be begotten, successively, and the heirs of their respective bodies; and for want of such issue, to the daughter or daughters of his said daughter, M. D. severally, and to the heirs of their respective bodies. And in case that *his said daughter should depart this life without issue of her body living at her decease*, then he did thereby give and devise, &c. The testator directed certain monies to be laid out in the purchase of land, to be settled upon his daughter, and her issue, in the same manner that he had devised his manors, &c. It was contended that the purchased estates should be limited to M. D. for life, remainder to her first son in tail male, remainder to her second and every other son in tail general, remainder to her daughters in tail general, remainder to the heirs of the body of M. D. Lord Hardwicke observed, that the question was, whether the words did not afford such an implication of the testator's intention of letting in all the issue of his daughter as would require the construction to be a *remainder* in tail in her, without which the daughter of a son could not take? The consequence of that construction would not secure the estate to the daughter of a son, which was the end intended to be answered by it; nor would it ever come to such a daughter but by descent from the mother if she thought fit to permit

it, she (the daughter) could not take *ex provisione testatoris*, though it would defeat the subsequent remainders. The ground of all the cases, he said, was that if the words that afford the implication, the words of contingency, the connecting words, were turned into words of limitation, they would give a clear estate tail by devise; as where the gift is to A., and if he die without issue to B., this is the same as if the gift was to A., remainder to his issue, &c. which, according to the doctrine of Shelley's case, is an estate tail, for the two estates conjoin: but as the words in this case being turned into a limitation would not give an estate tail, he held that the daughter should have only an estate for life.

To these cases we may add, as not irrelevant to the doctrine in question, the case of Denn d. Radclyffe *v.* Bagshaw, (*t*) where the testator devised unto his nephew R. B., and the heirs male of his body, all his houses, &c. in W., and for default of such issue of his body, to W. B., the second son of his brother, and the heirs male of his body; and for default of such issue to J. B., the third son of his brother, and the heirs male of his body; and for default of such issue, to the right heirs of the devisor. He then devised unto his daughter M. B., all his estate, lands, &c. called B. E., (the premises in question) for her life, and immediately

(t) 6 T. R. 512. (1796.)

after her decease to the first son of her body, if *living at the time of her death*, and the heirs male of such first son; and for default of such issue, to the second son of her body, if living, &c. and the heirs male of such second son; and so to the third and every other son of the body of the said M. B.; and their heirs male, as they should severally and respectively follow in seniority of age, and priority of birth; *and for default of such issue male*, to his said nephew R. B., and the heirs male of his body; and for default of such issue, to his nephew W., and the heirs male of his body; and for default of such issue, to his nephew J., and the heirs male of his body; and for default of such issue, to his own right heirs. It was insisted that it had been held in a variety of cases that the Court will put such a construction on a devise as will best effectuate the general intent of the devisor, contrary to any one particular limitation, if the carrying of that into execution would defeat the general intent, which in this case would be effected by converting the life estate of the daughter into an estate tail. But Lord Kenyon said that all the cases cited in support of this construction proceeded not on the formal and technical words, but on *informal* words in the wills, where the Courts were left to collect the intention of the devisor as well as they could from the different parts of the will: whereas here correct and technical expressions were used throughout; and no lawyer could have introduced more formal words.

We have seen that in several cases (*u*) the relative force of the word "such" has been disregarded, and that the Courts have considered the words "in default of such issue" as in themselves sufficiently strong to raise an estate tail by implication, even where the express devises, as construed by the Court, were not consistent with an intention to entail: but there are other cases in which these words have been held to be mere words of reference to the objects of the antecedent devise, notwithstanding that from the omission of words of inheritance those objects would take only life estates, and notwithstanding that they were the daughters of the first tenant for life, to whose sons the estate was previously limited in strict settlement.

One of these cases, Denn d. Bridden *v.* Page, (*x*)

(*u*) See also Chorlton *v.* Craven, App.

(*x*) *Supra*, 52. "The case of Denn d. Bridden v. Page has been relied on by the plaintiffs in error, where Lord Mansfield intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a judge; and it is always with doubt and distrust of my own mind, that I differ from him in opinion: but I am not prepared to say that there was any blunder in that will. There the devisor gave to S. N., the son of T. and M. N., for life, remainder to trustees to preserve, &c., remainder to the first and other sons of S. N., and the heirs male of his and their bodies; then having provided for the male heirs, (who are generally the favourites in cases of landed property,) it is not improbable that it should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of S. N., by his then wife; and for default of such issue, to the right heirs

is noticed in a former page. The case of Hayoo. Earl of Coventry (x) is a similar decision by Lord Kenyon. The premises in question were devised to trustees in fee, upon trust to raise 5000*l.*, and subject thereto, to stand seised of the premises to the use of his grandson R. Lord C. for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Lord C. in tail male; remainder to Lady F. C. for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Lady F. C. in tail male; and in default of such issue, "to the use of all and every the daughter and daughters of the body of the said Lady F. C., lawfully issuing as tenants in common, and not as joint tenants; *and in default of such issue*, to the use and behoof of his own right heirs for ever." The question was what estate the limitation to the daughters of Lady F. C. conferred? It was contended that they took estates tail; otherwise the general intent of the devisor, to be collected from the whole will, could not be effected. But Lord Kenyon said, "the general rule, which is laid down in the books, and on which alone

of S. N. for ever. Now when there is nothing in the will to lead to such a supposition, why should it be supposed that that was a blunder which brought forward the daughters of sons, in preference to the issue of the sisters? I have known many cautious testators make limitations in their wills like that. Per Lord Kenyon in Dacre v. Dacre, 3 T. R. 33. (1789.)

(x) 3 T. R. 33. (1789.)

could could with any safety proceed in the decision of questions of this kind, was to collect the testator's intention from the *words* which he had used in his will, and not from conjecture; and that in this case the objection occurred, *volunt, sed non dixit*. It could not be said to have been the intention of the devisor that the daughters should take estates tail general, as no such estate was given by any part of the will; and the devisor had totally laid aside the daughters of the first devisee, and the daughters of his (the devisee's) sons. The words here used, technically considered, only conferred an estate for life on the daughters. If, indeed, the word 'such' had not been introduced in this clause, the Court might, perhaps, have said that, as 'issue' is *genus generalissimum*, it should include all the progeny. But here the word 'such' is *relative*, and restrains the words which accompany it. Then it is said that the Court went as far, in Robinson *v.* Robinson, and in the other cases cited, as we are desired to go now. But it is sufficient to say, that in that case no doubt was entertained but that the estate was intended to go to the issue of the first taker; and the only doubt was whether the first taker should take an estate for life, or in tail; and it was to be collected from the whole will that it was his intent to give an estate tail [not to the first taker.] In the cases of Robinson *v.* Robinson, and Evans *v.* Astley, the testator sufficiently manifested his intention: but here he had used no words testifying his in-

tention to give an estate of inheritance to the daughters, and the Court could not supply them.

In the argument for the appellant in Person v. Wright, (y) the cases of Denn v. Page, and Hay v. Earl of Coventry, were said to be clearly distinguishable from Robinson v. Hicks, Pierson v. Vickers, &c.; because the gift was not, as then, to children generally, but to daughters, a particular class of issue, and because the words "for want of such issue" were satisfied by the previous estates of inheritance in the sons, and the life estates in the daughters. Still it can hardly be considered that the testator intended by the indefinite gift to the daughters to make them mere tenants for life; and it does appear rather difficult to understand why the words "in default of such issue" were thought sufficient in Robinson v. Hicks, Pierson v. Vickers, and Frank v. Stoven, to enlarge the estate of the first taker into an estate tail, in opposition to the express devises, and declared intention; and insufficient in Denn v. Page, and Hay v. Earl of Coventry, to enlarge the indefinite gift to the daughters, consistently with the general plan of the will, and in furtherance of the presumable intention;—why in the former cases these words were permitted to exert a positive force which nothing could withstand, and in the latter were strictly restrained to their mere relative signification

(y) 2 Bligh 23.

The words "in default of such issue" have also been held strictly referential where they occurred after a devise to one for life, with remainder to the children of the tenant for life, *and their heirs*.

As in Doe d. Comberbach v. Perryn, (z) where the premises were devised to D. C. for life, for her separate use, with a power of leasing, remainder to trustees to preserve contingent remainders, remainder to all the *children* of D. C., begotten or to be begotten on her body by testator's nephew J. C., *and their heirs*, for ever, to be equally divided between and among such children (if more than one) share and share alike; but if only one child, then to such only child, and his or her heirs for ever; *and for default of* such *issue*, to J. C., for life. Lord Kenyon said that words more emphatical could not be used to create a fee, than "to A., and his heirs for ever," and that here "in default of issue" was referable to children. He therefore thought it infinitely too much, in construing this will, to say, that these words only gave an estate tail to D. C.'s children; and that the Court, in saying so, must proceed on conjecture only, against the express words. And Buller, J. said, the Court could not reject any word, which had sense in the place where it stood, and that the words "such issue" were sensible if they meant children.

The same construction prevailed in the case of

(z) 3 T. R. 484. (1789.)

The King *v.* Marquis of Stafford, (*a*) upon a devise of copyhold lands to the testator's grand-daughter R. H. and her assigns during her natural life, remainder to trustees and their heirs during her life to preserve contingent remainders, remainder to the use of the lawful *issue* of the body of the said R. H. in such shares, manner, and form, as R. H. should by will appoint; and in default of appointment to the use of all the *children* of R. H., lawfully to be begotten, *and their heirs*, as tenants in common, and not as joint tenants; *and in default of* such *issue*, to the use of all the other children of his daughter R., begotten or to be begotten, and their heirs as tenants in common, and not as joint tenants; and in default of such issue, to the use of his own right heirs for ever. The question was, what estates the children of R. H. took? It was contended that they took estates tail. But the Court held that they took an estate in fee by purchase. Lord Ellenborough said, that the whole argument had rested in applying the words "in default of such issue" to the children of R. H. and their issue; but the Court thought that these words were in their ordinary and proper sense referable to the children only. (*b*)

These cases are hardly consistent with Frank *v.* Stoven, or with Denn d. Webb *v.* Puckey, (*c*) a

(*a*) 7 East. 521. (1806.)

(*b*) See also Doe d. Liversage *v.* Vaughan, 5 Barn. and Ald. 464., which confirms Hay *v.* Earl of Coventry, *supra*, 352. and shews the extent to which general intention threatened to go.

(*c*) 5 T. R. 299. (1793.)

case of *general intention*, which remains to be stated. The testator devised certain lands to his grandson N. W. for life, without impeachment of waste, and after his decease to the *issue* male of his body lawfully begotten, and *to the heirs and assigns of* such *issue male* for ever; *and for default of such issue male*, then to his grandson W. W. for life, with remainder to the issue male of his body, and the heirs and assigns of such issue male; and for default of such issue male, then to his grandson J. W. for life, with remainder to his issue male in like manner. N. W. suffered a recovery, and died without issue. Lord Kenyon observed, that it had been for a long time, and very properly settled, that if a devisor, ignorant of technical terms, sitting down to draw his own will, make clashing limitations, the Court, in construing that will, must depart from *some* particular limitations, in order to give effect to the general intention of the devisor. "That (he continued) was solemnly decided, and anxiously inserted in the certificate, in Robinson v. Robinson. Now what was the general intention of the devisor in this case? It was, that the male descendants of his grandson N. W. should take the estate, and that none of those to whom the subsequent limitations were given should take until all the male descendants of N. W. were extinct. It had been contended by the plaintiff's counsel, that N. W. only took an estate for life: if so, what estate was given by the words 'to the issue male of his body lawfully begotten,

and to the heirs and assigns of such issue male?" Was it to extend to more than one son? It would be difficult to extend it to more than one; and I conceive that the eldest must have taken the absolute interest in the estate. The devisor's intention will be best answered by our deciding that N. W. took an estate tail, which will comprehend all his issue male, and that none of the limitations over could have taken place while any of his issue were living."

Here Lord Kenyon seems to have considered that, according to the legal construction of the words of gift, this would have been a devise to N. W. for life, remainder to his eldest son in fee; but that the words "in default of *such* issue" contemplated an indefinite failure of issue, and were not referable to the son. If his Lordship conceived the words "issue male" in the gift to be used as a substituted term for heirs male of the body, then they were words of limitation, and N. W. took an estate tail under the rule in Shelley's case, and not by virtue of the rule supposed to be established by Robinson *v.* Hicks for the construction of wills which contain "clashing limitations." And if he conceived the words "issue male" in the gift to be used as a *descriptio personæ,* then it should seem that Doe *v.* Perryn and Denn *v.* Puckey are clashing authorities.

He who shall succeed in thoroughly reconciling

this modern doctrine of general and particular intention with the principles of the decisions which have been stated under this head of enquiry, or with the rules of law and received canons of construction, or even with itself, must possess in an eminent degree the happy faculty of educing symmetry and order from the crude anomalies of the law, and creating to himself, at least, clear and harmonious systems out of the elements of confusion.

IV. It is impossible not to perceive that even in the time of Lord Kenyon the courts began to be startled at the probable consequences of an indiscriminate admission of this doctrine in its full extent; and acknowledged, tacitly at least, the propriety of fixing limits to its growing power. In the discussion of the cases stated in a former section, (c) it has been shewn that the judges of later times have rejected this doctrine in several cases, which appeared to fall within the scope of its application, and which in the time of Lord Kenyon would probably have received the construction of an estate tail in the first taker on the principle of effectuating the general at the expense of the particular intention; but which previously to his time would have received the *same* construction on a *different principle, viz.* that of upholding the established rules of law in opposition to the intention.

(c) *Supra*, 121. 136. 138.

It may be thought that the determination in Jesson *v.* Wright proceeded solely or chiefly on the notion of effectuating the general or paramount intention, conformably to the doctrine of Doe *v.* Smith, and similar cases: but in fact that determination struck at the root of the doctrine by expressly treating the words "heirs of the body" as uncontrolled by the context, and as exerting their legal and natural force as words of limitation to all the heirs of the body of the first taker. Nothing can be more explicit as to this point than the language of the noble and learned persons who explained the grounds of the judgment. Lord Eldon said, that if the will had stopped at the words "heirs of the body," then, notwithstanding the testator had before given an estate expressly to W. W. for his natural life only, it was clear that by the effect of these words (heirs of the body) he would be tenant in tail; that, in order to cut down this estate tail, it was absolutely necessary that a *particular intent* should be found to control and alter it as clear as the *general intent* here expressed; that because children were included in the words "heirs of the body," it did not follow that "heirs of the body" must mean children only, where you could find upon the will a more general intent, comprehending more objects; and after stating that it had been argued that "heirs of the body" being the general description of those who were to take, and the words "share and share alike as tenants in common" being words upon which it was

difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child, and that "for want of such issue" must mean for want of heirs of the body; his Lordship added, "if the words 'children' and 'child' are so to be considered, as merely within the meaning of the words 'heirs of the body,' which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word 'issue') there is an end of the question."—Now the plain inference to be drawn from these passages is, that the words "heirs of the body" were considered as descriptive *proprio vigore* of the whole line of inheritable issue; that the words "share and share alike as tenants in common" were rejected as repugnant to the established sense of the words "heirs of the body;" that the word "child" was treated as involved in the comprehensive term "heirs of the body;" that the words "in default of *such* issue" were understood as relative to all the objects of the precedent gift, and not merely to the last antecedent "child," and consequently did not *cut down* that gift; and that the devise was therefore reduced to a simple gift to A. for life, remainder to the heirs of his body, and in default of such issue, over, which was clearly an estate tail by the express terms of the rule in Shelley's case. The words introducing the gift over, on which Lord Kenyon always relied, and on which he built his doctrine of general

and particular intention, so far from being made the ground of the decision, were regarded as the only circumstance capable of affording an argument against it; and it cannot be doubted that if the will had stopped at the word "child," the judgment would have been the same. The words "general intent," and "particular intent," were indeed thrown in (out of respect perhaps to the great names by which they had been used, and certainly not, as we shall presently see, from any respect to the doctrine in question,) but it is clear from the application made of these terms that they were meant to express the legal effect of the words of gift. Lord Redesdale disavowed in distinct terms any reliance upon what has been termed the general intention of devises of this nature; and observed, that to say "the general intent should over-rule the particular, was not the most accurate expression of the principle of decision, but that the rule was that technical words should have their legal effect, unless, from subsequent inconsistent words, it was very clear that the testator meant otherwise."

V. It only remains to state, that not only has the accuracy and propriety of this phrase "general and particular intention" been denied by Lord Redesdale; but that Lord Eldon has on more than one occasion condemned the doctrine as tending, under the pretext of serving the general intent, to destroy both general and particular intent. In

Jesson v. Wright, his Lordship said (e) "there is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate according to the general and paramount intent to destroy the interest both under the general and particular intent. However, (added his Lordship,) it is definitely settled as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail; and courts are bound to give effect to the paramount intent." Attending to the subsequent parts of the judgment, which have been already stated, it may be collected that by this passage nothing more was meant to be conveyed than that it is definitely settled that the words "heirs of the body," &c., unless clearly explained, comprehend the whole line of succession, and that a gift in those words unexplained, preceded by the gift of a particular estate of freehold of the same quality to the ancestor, operates, according to the rules of law, to vest the inheritance in the ancestor, in opposition to the words and the intention, and that courts of judicature are bound to impose that construction upon the will.

To sum up the short but eventful history of the doctrine:—Lord Kenyon found it established as a rule of construction in wills, that the words "heirs

(e) 2 Bligh 51.

of the body," &c. unexplained were words of limitation, and enlarged the estate of the first taker. This rule, either because it had contracted the rust of antiquity, or because it presented one of those barriers which must be broken down ere a new and liberal system of exposition, having pure reason for its basis, and natural equity for its object, could be firmly established, was destined to be expunged in effect from modern jurisprudence. But as the rule, however unworthy in itself of the serious regard of grave and learned men, stood connected with the main fabric of the law of real property, and great names had bowed to its prescriptive authority; it was necessary to look around for some new principle of construction, which might supply its place. The certificate of the Court of King's Bench in Robinson *v.* Hicks, promulgating, as the ground of that decision, necessary implication founded on manifest general intention, seemed to furnish such a principle. It was, therefore, held that "heirs of the body," &c. in the operative part of a gift were restrained and cut down to words of particular designation by any expressions inconsistent with a course of descent; but that if this gift was followed by a gift over in default of issue, or even of *such* issue, the manifest general intention to be collected from the terms of the ulterior devise overreached this constructive gift to individual objects, (whether those objects would have taken in fee or for life only) and raised an estate tail in the first

taker by *implication*, as in Doe *v.* Smith, Doe *v.* Cooper, &c. It followed, as a necessary consequence, that if there happened to be no such devise over, the words of gift took effect according to the construction thus imposed upon them; so that if in Doe *v.* Smith there had been *no* devise over, the first taker would have been held tenant for life, with remainder to the children as purchasers; and if in Doe *v.* Collis, there had been a devise over for want of issue, the first taker would have been held tenant in tail, and nothing would have vested in the children by purchase. The restricted construction, therefore, of the words "heirs of the body," &c., thus anxiously established, was entirely at the mercy of a few connecting words, introducing a further disposition of the property. If the presence of such a clause let in manifest general intention, it bore down all the particular limitations; and the admission of the new doctrines brought about, by an indirect and unnatural process, the very same result which would have been induced by applying the discarded rule of law. That the authors of these doctrines were actuated by a sincere zeal to establish testamentary disposition on what they deemed to be the only secure and rational principles no man can entertain an instant's doubt: but it were vain to conjecture by what train of reasoning such a mind as Lord Kenyon's was induced to pursue a course so apparently inconsistent as that of regretting at one time that wills were not construed with the same

strictness as deeds; (a) at another time rejecting, or impugning, as inimical to the intention, settled rules applicable to the construction of both; and, finally, admitting a doctrine so vague as that of manifest general intention, founded on necessary implication, to be applied in defeating the only assignable end proposed to be attained by the exclusion or relaxation of the strict rules of law; *viz.* that of preventing the devisee for life from taking a larger estate than was expressly given to him, and of allowing his issue to take as purchasers. It was evident that such a state of things could not long subsist. Succeeding judges yielded for a time a reluctant submission to the authority of Doe *v.* Smith, and other cases of that class: but perceiving that those cases clearly admitted in effect, if not in terms, that "heirs of the body," &c., in connection with a distributive direction, or other repugnant expressions, were properly descriptive of individuals as children, &c. they began to enquire into the sufficiency of the grounds on which an estate tail had been adjudged to the first taker to the utter destruction of the express estates which (according to the interpretation in Doe *v.* Smith, &c.) were devised to those individuals as purchasers. These grounds appearing, as in truth they were, to be untenable, the courts determined to support and preserve the estates so admitted to be created. They adopted,

(a) *Supra*, 197. *n.*

therefore, the principle applied by Lord Kenyon to the construction of the words of gift, and rejected his doctrine of general intention. At first they proceeded upon the effect of superadded words of limitation, or other words capable of carrying the fee, as affording a seeming distinction; till Doe *v.* Jesson, rejecting that distinction, went finally to sanction this modern construction of the words "heirs of the body," &c., and to exempt it from the influence of general intention. If this sketch of the rise, progress, and decline, of the doctrine be correct, (and I think it may be traced with more or less distinctness, through a line of decisions from Doe *v.* Smith to Doe *v.* Jesson,) it follows that the construction, which prevailed in the class of cases considered in the fourth section, was in fact a branch of this doctrine of general and particular intention; and that the principle of those cases was latent, as well in Doe *v.* Smith, &c. as in Doe *v.* Laming. The judgment in Jesson *v.* Wright struck at *that* principle, and finally destroyed the whole doctrine as laid down by Lord Kenyon, root and branch, reverting, though late, to that point at which all experiments of this description must, from the natural inclination of mankind, and the strong tendency of the law itself, towards fixed principles in matters of property, ultimately rest—an adherence to the established rules of legal construction.

SECTION VIII.

Of Titles gained by the Destruction of Contingent Remainders.

The rule of law which requires that a contingent remainder shall vest during the continuance of the particular estate, or *eo instanti* it determines, necessarily renders such remainders liable to be defeated, not only by the tortious alienation of the tenant of the particular estate, but even in some cases by his innocent conveyance. If there be legal tenant for life, with legal remainders in contingency, and he make a feoffment, or suffer a recovery, &c. this of course amounts to a forfeiture of his life estate, and destroys the remainders; if he surrender to the vested remainderman or reversioner, or join with such remainderman or reversioner in a conveyance by lease and release, or bargain and sale, &c., or if, having the immediate remainder or reversion in himself, he make an ordinary conveyance, the life estate is merged in the vested remainder or reversion, and the con-

tingent remainders can never arise. (*a*) The same effect may result from the descent of the legal fee upon the tenant for life, where such descent is not immediate from the person by whose will the limitations were created. (*b*) In all these cases the contingent remainders fall with the particular estate by which they were supported. The act of the tenant for life which induces the destruction of the remainders, though it work, in the instance of a tortious conveyance, such a wrong or injury to the vested remainderman or reversioner as entitles him to enter, works no wrong or injury of which the persons who might eventually have succeeded under the contingent remainders can complain in a court of justice. They are excluded by the strict rules of law, to which equity conforms. The title which is gained by the destruction of the remainders cannot be impeached on the ground of any fraud or breach of trust on the part of the tenant of the particular estate, (*c*) who is under no obligation, legal or moral, to abstain from those acts by which his estate may be determined before the contingency happens. It was the folly of the person creating the limitations not to adopt the precaution of limiting a legal estate of freehold to trustees to preserve the contingent remainders, or of vesting the legal fee in trustees, in order that the particular estate and remainders might arise by

(*a*) Fearn. C. R. 241. *et seq.* (*b*) Fearn. C. R. 266.
(*c*) *Ib.* 252.

way of trust in equity, and consequently be placed beyond the reach of the rules which subject legal contingent remainders to the power of the particular tenant. (*d*)

This doctrine, as respects limitations of the legal estate, has long been finally settled. Lord Kenyon lamented the consequences of the doctrine, and had it in contemplation to propose some legislative remedy; (*e*) which, however, was abandoned from the difficulty, perhaps, of framing an act calculated to attain the end without introducing greater mischiefs, or from an observation of the ill success which had attended all attempts to legislate on such subjects. He admitted, (*f*) however, that "it was too late, as the law then stood, to say that such was not the established doctrine of contingent remainders. That doctrine, indeed, (continued his Lordship) involved in it difficulties which had been frequently felt by wise and able lawyers, who had wished to break through the rule; but they had been deterred from the attempt by a consideration of the consequences that might *possibly* ensue. There were two instances, it was true, where the law was otherwise; in equitable estates, where the contingent remainders were not destroyed, *because* the estate was vested in trustees to preserve the contingent remainders [*q.* the accuracy of this

(*d*) Fearn. C. R. 246. (*e*) 5 Ves. 547.
(*f*) 4 T. R. 64. in Doe d. Willis *v.* Martin.

reason] and in copyholds where the estate in the lord of the manor would support all the remainders: [*ib.*] but in the case of freehold estates of inheritance, the rule was so established that it was not to be shaken." There is a multitude of cases in the books of tenants for life destroying contingent remainders, and recovering at law without objection, by the strength of the title so acquired. To have broken through the rule, therefore, would have been attended with a certain and immediate effect more ruinous than any consequences to be apprehended from permitting the law to take its course.

It is true that courts of equity do not *favour* the destruction of contingent remainders. They refuse to give relief against the tenant for life, only because it is their duty to follow the law. But where the estates are purely equitable, the doctrine which would render them destructible by the act of the tenant for life is inadmissible, because the equitable freehold is not governed by the same rules, as respects the liability to forfeiture, &c. with the legal freehold. Equity leans in doubtful cases against such a construction of the limitations as would enable the tenant for life to destroy the contingent remainders; and so, I apprehend, would a court of law. In the execution of marriage articles, and executory trusts, courts of equity interpose limitations to trustees to preserve contingent estates. They punish in certain cases trustees who

are guilty of destroying contingent remainders which they were appointed to preserve, and extend the liability to purchasers taking with notice of the breach of trust. But it does not appear that courts of equity have ever gone the length of saying that where the remainders are clearly destroyed, and no fraud or breach of trust can be imputed, it is nevertheless incompetent to the party thus acquiring, by legal means, a title perfectly unimpeachable on any judicial ground, to sue upon that title, and enforce all the rights of ownership as effectually as if the estate had been gained by any other act or consequence of law. Lord Hardwicke, when contending against the extension of the legal doctrine to trust estates, observed (g) that "the destruction of contingent remainders by the act of the tenant for life was considered as a wrong without a remedy, and so strongly a tort that it is a forfeiture of his own estate; and, therefore, works a destruction of the remainders. Now, continued his Lordship, if equity never suffers other wrongful acts, or any thing similar, to gain or defeat the trust estate, while the trustee is in possession, why should this take place, or the Court strive to preserve a power to *cestui que trust* for life, the execution whereof the law calls a wrong?" (h) This passage cannot be treated as

(g) 1 Atk. 591. in Hopkins v. Hopkins.

(h) The following extract is taken from a Note of the judgment in Lord Hardwicke's handwriting. 1 Jac. and Walk. 18. n. b. "The destruction of contingent remainders by the act of

holding out any authority for the position that a tenant for life, gaining the fee by the destruction of contingent remainders, is guilty of that degree of moral turpitude which renders him unclean in the eye of equity. The tort or wrong, of which Lord Hardwicke speaks as working a forfeiture of the estate for life, and consequently a destruction of the remainders, is done to the vested remainder man or reversioner. It consists in an assumption of ownership derogatory to his rights, and which entitles him to enter for the purpose of asserting those rights; but the law does not recognize in the tortious act of the tenant for life any tort or wrong as against the objects of the contingent limitations, which its own rules, and its own policy, have made wholly dependent on the subsistence of the particular freehold.

It does not seem to have occurred to the Courts, that a tenant for life, resting his title on the destruction of contingent remainders, could for any purpose be judicially considered as a person who had acquired the inheritance by violence and in-

the tenant for life, is considered in law the wrong without a remedy. The law books call it a tortious act. Now if equity has never yet suffered any other of the wrongful acts above mentioned, or any thing similar to them, to gain or transfer an estate, whilst the trustees continued in possession—what reason can be given why this should take place, or why the Court should strive to preserve this power to the *cestui que trust* for life, the execution whereof the law itself calls a wrong."

justice; and who, though dispunishable by law, was to be held in abhorrence, and denied the extraordinary aid of a court of equity. On the contrary, it appears to have been taken for granted that a title thus acquired was in all respects equally available with a title acquired by any other means which the law had thought fit to sanction. Thus in a case (i) where an action was brought by the purchaser for the recovery of the deposit money paid upon a purchase, from the assignees of a bankrupt, it appeared that the vendors were in a situation to make a title by the destruction of contingent remainders, (the estate being limited to the bankrupt, who was willing to concur, for life, with contingent remainders to his sons, with the reversion in fee in the assignees) and though it was held that as this ability to make a title was not disclosed till after the action was commenced, the purchaser was entitled to recover, yet Lawrence, J. observing, that as the bankrupt had no son *in esse*, the purchaser might be compelled to take the title hereafter, the counsel for the purchaser admitted that, as the case was then circumstanced, there was a good title, objecting only that it ought to have appeared at the time of delivering the abstract. The vendor's counsel assumed it as a clear point that equity would compel a specific performance; and the Court observed that it was little more than a question of costs to decide a wager between two

(i) Seaward v. Willock, 1 Smith 390. 5 East 198. *Supra* 113.

conveyancers. If the purchaser had been apprised in due time of the state of the title, it is clear that he would not have been allowed to recover his deposit. This case, indeed, decides nothing as to the discretion which a court of equity would exercise in a suit for a specific performance, for, as was observed by Lord Ellenborough, how far the title communicated since the action brought might, in another course of proceeding, in another place, render that action abortive, and whether the plaintiff might not ultimately be compelled to fulfil his agreement, it was not for them to decide. But it shews that no suspicion was entertained that such titles could not be forced upon a purchaser. This too was rather a strong case, as the remainders were subsisting, and the vendors proposed to destroy them for the purpose of making a title.

Titles gained by the destruction of contingent remainders, (not involving any breach of trust) have frequently been accepted under the advice of eminent conveyancers. If the fact of their destruction be established beyond a doubt, and if it be equally clear that the persons who might have claimed under those remainders are left entirely without remedy,—why should there be any hesitation in pronouncing the title to all intents valid and marketable? But other gentlemen appear to have doubted (for they can hardly be said to have expressed an opinion upon the point) whether a court

of equity will, at the instance of a vendor, resting his title on the destruction of contingent remainders, enforce a specific performance? Mr. Butler, after observing that though the destruction of the contingent remainders by a trustee appointed for preserving them is punishable in equity, still where there is a bare tenant for life for his own benefit, with remainders over in contingency, if he destroy the contingent remainders, it is no breach of trust, for where there is no trust, there cannot be a breach of trust, and that there is no ground consequently for a court of equity to interfere; adds, (*k*) "titles, however, depending on the validity of an act of this nature, can never be recommended. The power of tenant for life to destroy contingent remainders is *strictissimi juris*. It certainly, therefore, can never expect favour, or any thing beyond mere support." Where a title, which cannot be impeached in any court of judicature, has been gained by any legal mode, which the law, though it may not favour, is bound at least to support;—where such a title is in fact a mere legal consequence flowing from the rules of law, which put the remainders in the power of the tenant for life, and in some cases render it difficult for him to act upon his rightful ownership, without involving their destruction, one cannot readily discover any satisfactory reason for rejecting such

(*k*) Butl. Co. Litt. 290. *b*. *n*. 1. S. 3.: but see Butl. Fearn. C. R. 253. *n*.

a title. The title under a devise to one for life, remainder to his heirs general or special, is equally dependent on the strict rules of law; and nothing beyond mere support (nor always *that*) has ever been extended to it. Mr. Sugden also in reference to the observations which fell from the Court in Seaward *v.* Willock, as to the specific performance of the contract in equity, observes, (*l*) "it should seem that the purchaser could not be compelled to take the title, for equity does not countenance the destruction of contingent remainders," referring to Roake *v.* Kidd. (*m*) It has been observed, however, that in Seaward *v.* Willock, the remainders were not in fact destroyed; and the observation that equity does not countenance the destruction of contingent remainders may have been intended to import that equity will not act where its interposition would occasion the destruction of the remainders.

Whatever doubts may exist in the minds of some individuals upon this point appear to be founded principally, if not solely, on some expressions which fell from Lord Eldon in Roake *v.* Kidd. The decision of the case, however, proceeded on a very different ground, it being extremely questionable whether the limitations were contingent remainders, or executory devises. (*n*) The import of

(*l*) Sugd. Vend. 6th edit. 355. *n.*

(*m*) 5 Ves. 647.

(*n*) *Supra*, 16.

Lord Eldon's observations seems to be, that the Court will not *sanction* or *establish* such a title. There was, perhaps, something peculiar in the circumstances of that case which called for an expression of dissatisfaction at the conduct of the tenant for life.

It has been laid down by the same high authority, that the discretion of the Court in suits for the specific performance of contracts must be regulated on grounds that will make it judicial. (a) But it should seem that any deviation from the strict line of moral duty imputable to a tenant for life, who destroys contingent remainders not confided to his keeping, but legally submitted to his power, can hardly be the subject of judicial cognizance. The plaintiff, indeed, must come into Court with clean hands, so far as relates to the matter at issue; he must do equity towards those against whom he seeks it; and therefore circumstances of fraud, misrepresentation, &c. not sufficient to warrant the active interposition of the Court, may induce it to withhold its extraordinary aid. But in a suit for the specific performance of a contract for sale, the Court cannot enquire into the moral fitness of the means to which the vendor owes his title to the estate; it cannot be required of him that he should have obtained it without any dereliction of duty as a husband, parent, or friend. If he shew a title

(a) 7 Ves. 35.

well founded in law, and nothing inequitable can be alleged against him in relation to the matter of the suit, he has established a right to the assistance of the Court; and it cannot be objected to him that he has been guilty of "a wrong without a remedy" towards third persons in another transaction. It may be true, that he *ought* not to have pursued the means by which he has acquired the property; that a man ought not to keep an estate which he has borrowed of a friend as a qualification to kill game; (*b*) that a tenant for life ought not to destroy contingent remainders; that a tenant in tail ought not to disappoint the just hopes and expectations of the issue and remaindermen, in violation of the last solemn injunctions of a will, which he is bound, perhaps, by every tie of honour and gratitude to fulfil, according to the intention: but in those cases the Court can only say, *fieri non debet sed factum valet.* The judgment of Sir Joseph Jekyll, in Cowper *v.* Earl Cowper, contains some passages apposite to our present purpose. "As to the hardship (he observed) of setting up this right in respect to the person against whom the suit was brought, I own, and cannot forbear declaring, that were I to consider the matter, not as sitting in judicature, but taking in all manner of considerations, such as honour, gratitude, private conscience, &c., I must think this claim should never have been made."

(*b*) See Doe *v.* Roberts, 2 Barn. and A. 367. Cecil *v.* Butcher, 2 Jac. and W. 565.

"Upon the whole matter, my opinion is, this title should not have been set up; but now it is so, it appears a plain and subsisting one. The law is clear; and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. It is said in Rook's case, 5 Rep. 99. *b.*, that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it: but in no case does it contradict, or overturn, the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."

If moral conduct be gone into, (and there is no pretence for saying that the law imputes any guilt to the tenant for life,) it should seem that the act of a tenant for life in defeating the title of the rightful owners by the destruction of contingent remainders, (which act, after all, may have been done from laudable motives, with a view to family

arrangements, &c.) is not more open to the censure of the moralist, than the subsequent retention of the estate against the rightful owners; and that no person succeeding under a title acquired by such means, can be said to enter into a court of equity with clean hands. But it would be too much to contend that the estate is to descend from ancestor to heir with this mark of reprobation fixed upon it for ever. This would tend to a perpetuity; and would be utterly inconsistent with the boasted policy of the law of England, which favours alienation. The objection, therefore, if allowed to prevail at all, can only be personal to the tenant for life, so as to render the title in his hands, though good for every other purpose, insufficient to confer a right to enforce the specific performance of a contract fairly and honestly entered into in relation to it.

Such a doctrine would be attended with striking inconveniences, and no apparent benefit. How, in many cases that might be put, is the tenant for life to enjoy in its full extent the *jus disponendi*, incident to his rightful ownership, without causing the destruction of the contingent remainders? If there be tenant for life, with contingent remainders to his issue, with the vested remainder or reversion in himself, his common conveyance by lease and release, &c. will exclude the remainders. It is frequently doubtful whether the first taker is tenant for life with contingent remainders, with the vested

remainder in himself, or is tenant in tail. If he should suffer a recovery, a court of law, without deciding the question, would think it sufficient to say that *quacunque via*, he has a good title. But if a court of equity should say that the construction of the devise is doubtful, and that the title is resting on the destruction of the contingent remainders, is such as the vendor cannot be permitted to set up (though he suffered the recovery in consequence of the positive opinion of counsel, that he was tenant in tail,) it is obvious that he would be placed in a singularly awkward predicament. Nor is it easy to discover that any object would be promoted by the admission of the doctrine in question. Tenants for life would not be deterred from destroying contingent remainders, nor induced to resettle estates so acquired. Expedients would be devised for effecting the purpose without laying the title open to the supposed objection. The tenant for life might first grant away the vested remainder or reversion, then commit a forfeiture of his life estate, whereupon the grantee might enter and sell the inheritance in possession. The doctrine would tend to involve the administration of equity, and the titles to property, in the greatest embarrassments, without, as it should seem, conducing to any desirable end.

It remains only to observe that there is no analogy between the case of a tenant for life who, previously to the contract, has gained a title by the

destruction of contingent remainders, and that of a voluntary settlor, who seeks to enforce a contract for sale in avoidance of his own settlement. The Court will not lend its assistance to the latter, (q) because the settlement is binding upon him, and void only as against the purchaser; and the Court by acting would be instrumental in enabling him to defeat his own solemn deed.

(q) Smith v. Garland, 2 Mer. 123.

APPENDIX

[illegible]

[illegible]

[illegible] it is not a [illegible]

[illegible] understood that [illegible]

[illegible] to the circumstances [illegible] remainders. [illegible] to have that [illegible] whether [illegible] offered [illegible] which of course the [illegible]

(a) I have [illegible] for the plaintiff

APPENDIX.

Willcox v. *Bellaers*. (*a*)

ROLLS, JAN. 20, 1824.

GRAHAM, B.—No judgment can be given in consesequence of a difference of opinion.

Notwithstanding the respect I have for the authorities which have been cited, my opinion is *clear* that it is an estate for *life* only in the first taker.

Master Alexander.—I am of the same opinion; it is not a case for a specific performance.

Master Stratford was not present, but it was understood that he differed from the above opinions.

[It does not appear that the Court adverted to the circumstance of the destruction of the contingent remainders. But it seems that the plaintiff was entitled to have that point considered, if the Court thought it doubtful whether he took an estate tail. The Master of the Rolls offered a case for the opinion of a court of law, which of course the defendant's counsel declined.]

(*a*) I have been favoured with the above note by the solicitors for the plaintiff.

OPINIONS OF COUNSEL

ON THE

CONSTRUCTION OF THE WILL OF THOMAS WILLCOX.

"I think that Henry Thomas Willcox is tenant for life of the premises, with a power of appointment by will, to any of his children in fee, with a vested remainder (*a*) in himself in tail in default of appointment, (*vide* Goodright *v.* Pullen, 2 Ld. Raym. 1437., and Morris *v.* Le Gay, 2 Burr. 1102.,) and consequently that he may by suffering a recovery destroy such power of appointment, bar the intail and remainders, and convey a fee to a purchaser, subject to the dower of the testator's widow."

(signed) George Downing,
Lincoln's Inn, Oct. 6, 1798.

Opinion on behalf of Mr. Bellaers the purchaser.

"The title is not marketable. It is very questionable whether, under the will of 1783, the children of the seller do not take by purchase; and some gentlemen would doubt whether the power of appointment could be destroyed. If the children took as purchasers, the title is *of course* bad."

Lincoln's Inn, March 27, 1819.

Opinion on behalf of another purchaser, who accepted the title.

"What Mr. ————'s doubts may be as to the interpretation of Willcox's will I know not; the singularity of

(*a*) This is not accurate. The *power* does not suspend the union of the two limitations.

the devise had struck me. I had fully made up my opinion on the subject before I wrote on the abstract.

The only question is, as to what estate Mr. Henry Thomas Willcox took under the will of his father.

If the limitation had been "to my son for life, remainder to the heirs of his body," and had stopped there, he would, of course, have taken an estate tail.

But the question is, whether the superadded words "to their heirs and assigns for ever," control the first limitation in tail, giving the son an estate for life, with remainder to his children as purchasers. That this is not so controlled, and that Mr. Henry Thomas Willcox took an estate tail, is, I think, clearly proved by the case of Frank *v.* Stovin, 3 East 548., where the limitations were almost in terms the same as in the will of the late Mr. Willcox. They were these: "devise to A. for life, without impeachment of waste, and with power of jointuring; remainder to the issue male of A.'s body, and their heirs; and in default of such issue, to B. for life, in the same manner." The Court held, that A. took an estate tail, and that by a recovery, and the deed to lead the uses thereof, A. acquired an estate in fee simple.

The only points of difference between the two cases are—

1. That in the one cited there was a power of jointuring, and in this there was a power of appointment: but that is an immaterial difference, as they are both powers in gross, and as such would be both extinguished by a recovery. And,

2. That in that case the words are "issue male of A.'s body, and their heirs." And in this the words are "*heirs of the body, and their heirs and assigns for ever,*" which latter words, as they take in the whole line of descendants both male and female of the first taker, imply more strongly the intention of the testator, that all the issue of Henry

Thomas Willcox should take through him in a course of descent, and, consequently, that Henry Thomas Willcox should take an estate tail, than where the words are issue male, excluding the class of female descendants.

Understanding then this to be an estate tail in Henry Thomas Willcox, the subsequent limitation to the daughter of the testator cannot be construed to be an executory devise, which can only be limited to take effect after a fee.

On the whole, I am of opinion that any court of equity would enforce a specific performance of an agreement entered into by Mr. Willcox, for the sale of this estate. I do not see any other questions arising on the abstract, supposing all the parties to the deed I have drawn join in the conveyance.

Lincoln's Inn, April 11, 1819.

Opinion on behalf of Mr. Willcox, the vendor.

I have considered this case; and I am of opinion that Henry Thomas Willcox took an estate tail under the above will, with a power of appointment among his children; and that the intail and remainders were barred, and the power of appointment destroyed by the recovery suffered by him, presuming such recovery to have been duly suffered; and, consequently, that he can make a good title to a purchaser. I think it is impossible to contend that the words "heirs of the body" operated as words of purchase; it is clear that the superadded words of limitation in fee will not alone restrain their import: (Wright *v.* Pearson, Ambl. 358. Goodright *v.* Pullyn, 2 Ld. Raym. 1437. and see King *v.* Burchell, Ambl. 378.) but, admitting that the heirs were to take as purchasers, they must have taken estates in fee; and as such estates were contingent, and as all

limitations after a contingent limitation in fee must also be contingent, (Doe v. Holme, 3 Wils. 237, 241. Denington v. Kime, 1 Ld. Raym. 203. Goodright v. Dunham, Dougl. 264. Doe v. Perryn, 3 T. R. 484. Webb v. Putkey, 5 T. R. 299. And see Smith v. Horlock, 7 Taunt. 129.,) the consequence would be that all these limitations were destroyed by the recovery, and that Henry Thomas Willcox became entitled as heir at law of the testator, for I presume that he was such heir: (a) but it should be observed that courts of equity do not countenance the destruction of contingent remainders, (Roake v. Kidd, 5 Ves. 647.). If, indeed, the heirs were to take in tail by purchase, then, though the limitation to them was destroyed, the limitations over were vested, and not affected by the recovery: but, in order to support this construction, it must be contended that the superadded words "their heirs" were reduced by the subsequent words "without issue," to mean "heirs of the body," so that we should then have a limitation to "the heirs of the body of Henry Thomas Willcox, and the heirs of their bodies;" and if the will stood thus, I think it would not be attempted to be denied that Henry Thomas Willcox took an estate tail, (Shelley's case, 1 Co. 93. Minshull v. Minshull, 1 Atk. 411., and see Poole v. Poole, 3 Bos. and P. 620.) for that construction must be attacked, if at all, on the ground that the superadded words were intended to designate a different description of heirs from that which would come within the scope of a limitation to the heirs of the body of Henry Thomas Willcox. With respect to the power of appointment, I think that, as a power in gross, it was capable of being released or extinguished by the donee, and that it was in fact completely put an end to

(a) He was not heir: but he took the vested fee under a residuary devise.

by the recovery. The power, considered as a power annexed to an estate tail in Henry Thomas Willcok, was clearly destroyed by the recovery.

W. H.

Middle Temple, April 16, 1849.

Second opinion on behalf of Mr. Bellaers.

I am clearly of opinion that Mr. Bellaers cannot be advised to accept the title without the sanction of a judicial opinion; and in my opinion he will not be compelled to take the title. If it is put as a title depending on the destruction of contingent remainders, *of course* it cannot be forced upon the purchaser. It is incumbent therefore on the seller to make out that he took an estate tail under his father's will. This he will find it difficult to do. In the late case of Doe *v.* Hately, in the King's Bench, upon a special verdict, which I argued for the defendant, and which is not reported,(*a*) the testator devised "to William an illegitimate nephew for life, and after his decease he gave the lands unto the heirs of the body of William, lawfully issuing, as W. should appoint; and in default of appointment, then to the heirs of Wm. lawfully issuing, share and share alike; and if but one child, the whole to such only child, and for want of such issue, to testator's right heirs." The Court of B. R. held, that W. took for life, and that his children took as purchasers life estates only. We have appealed to the House of Lords. Lord Ellenborough said, that the testator had translated heirs of the body to mean children; and Bayley, J. relied on the circumstance, that if an appointment was made, the child would take by

(*a*) Since reported Doe *v.* Jesson, *supra*, 130.

purchase. It will be seen how closely that decision applies to this case. For in this case it appears more clearly than it did in that, that the testator used the words "heirs of the body" as synonimous with children; and here the children would take the fee, and therefore the case is not open to the argument, upon which we forcibly relied in Doe *v.* Jesson, *viz.* that the words "heirs of the body" had never been cut down to pass life estates only. (*b*) Heirs of the body are now construed to mean children in cases which would not have received that construction in Lord Kenyon's time, Gretton *v.* Haward, 6 Taunt. 94. (*c*)

Upon the point as to the power, I have a strong opinion. I argued the point lately at great length before the Vice-Chancellor, in Sir John Berney's case, which is not reported, and the Vice-Chancellor was with me: but it became unnecessary to decide the point.

Upon the whole, I think it very clear, that the purchaser cannot be advised to accept the title.

Lincoln's Inn, April 30, 1819.

Another opinion by which one of the purchasers was induced to complete.

I think that according to the true construction of Mr. Willcox's will, Henry Thomas Willcox took an estate tail, subject to a power of appointment, among or in favor of any of his children. With the exception of the power of appointment, the case would be precisely that of Morris *v.* Le Gay, cited 2 Burr. 1102. See also Goodright *v.*

(*b*) This must be understood "had never been cut down to mean children, &c. where there were no *other* words to give those objects the fee." *Vide supra*, 104.

(*c*) *Supra*, 133.

Pullyn, 2 Ld. Raym. 1437. Wright *v.* Pearson, 1 Eden. 119., and also reported by Ambler.

If Henry Thomas Willcox took an estate tail, (as I think he did,) his recovery acquired the fee simple; and destroyed, I think, the power of appointment.

But there may be some ground to contend, that as the testator has adopted the word "children" in the devise to such of them as Henry Thomas Willcox should appoint, it is to be inferred, that he meant the words "heirs of the body" to be construed in the sense of "children;" that he could not intend that the issue of Henry Thomas Willcox should take under the appointment by purchase, and for want of appointment by descent. There may be weight in the argument: but still, I think, the children, if they took by purchase, would take a contingent remainder in fee simple, which was barred by the recovery; and if Henry Thomas Willcox was the heir at law, (as I take for granted he was,) he was capable of conveying a safe title to a purchaser. *I am not acquainted with any decision, nor does any principle occur to me, by which a court of equity can refuse to compel a purchaser to accept a title merely because it is grounded on the destruction of contingent remainders.* A tenant in tail may defeat the claims of his own issue by fine, and not only of his own issue, but of those in remainder, by recovery. And why may not a tenant for life destroy by legal means contingent remainders?

There is no reason, as appears to me, for the only construction which can defeat the title, namely, that the issue, if they took by purchase, would take an estate less than the fee; and upon the whole, I think that the recovery suffered by Mr. Henry Thomas Willcox, (if properly suffered,) acquired a good title, supposing the title to be otherwise unobjectionable.

Lincoln's Inn, Oct. 6, 1819.

Further opinion.

It appearing that Henry Thomas Willcox was not the heir at law of the testator, it becomes necessary to consider the residuary devise to Henry; and upon the authority of the case of Doe *v.* Scott, 3 Maul. and Sel. 300, I think that if the children took a contingent remainder in fee by purchase, the reversionary estate until the contingency happened passed by the residuary devise to Henry Thomas Willcox. (*a*) I see, therefore, no reason to vary my opinion.

Lincoln's Inn, Oct. 7, 1819.

Another opinion on behalf of Mr. Willcox the vendor.

In my opinion Mr. Willcox was tenant in tail. That conclusion is warranted by Goodright *v.* Pullyn, 2 Ld. Raym. 1437., and by the late case of Measure *v.* Gee, (*b*) on which the Court of King's Bench certified after an argument by Mr. Sugden and myself in last October. And though, in my opinion as an individual, the power was not barrable by a common recovery, yet as Sir John Leach has decided that the power is destroyed, (see Smith *v.* Death, Sugd. Powers, 3d edit. p. 81.) the vendor may with propriety be advised to file a bill for a specific performance. It is singular that there is not any report (*c*) on this important point.

Lincoln's Inn, Dec. 15, 1821.

(*a*) *Supra*, 36 *n.* (*b*) *Supra*, 60.
(*c*) Since reported, *supra*, 35 *n.*

Morris v. Ward and Others. (a)

As stated by Lord Kenyon, 8 T. R. 518., from Mr. Filmer's Note.

Thomas Wardell, seised in fee, had issue a daughter named Lucretia, and by his will dated the 20th of February, 1682, devised, thus:—"I give and bequeath unto my daughter Lucretia, wife of G. Andrews, all my plantation, together with the negroes, &c., charged, &c. during the natural life of my said daughter. *Item*, I bequeath to the *heirs of the body* of my said daughter Lucretia begotten, or to be begotten, *and to his or her heirs for ever*, after my said daughter's decease, all my before named plantation, &c.; but *for want of such heirs of the body* of my said daughter, I also give and bequeath the aforesaid premises, after the decease of my said daughter, to my own next heirs, and their heirs for ever." The reasons of the counsel in the printed case:—"It is a general rule of law that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate tail; and though this be in the case of a will, there is no reason to depart from that rule; for if Lucretia were construed to have an estate for life only, then the remainder to the heirs of her body would be words of *purchase*; (b) and then though she had had several sons, yet the eldest only would have been heir, and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take by his using the word 'heirs' in the

(a) This case is shortly, and less accurately, stated, *supra*, 56. under the name of Morris v. Le Gay. It is so stated in Fearn. C. R. 6th edit. 161.

(b) This must mean words descriptive of the individual heir out of the of the ancestor, and the heirs of such heir, *supra*, 273.

plural number. And the subsequent clause 'for want of such heirs of the body of my said daughter, to my own next heirs, and their heirs for ever,' is a further explanation of his *meaning*, that his *daughter* should take *an estate tail*, with remainder to his own right heirs." Signed N. Fazakerley, D. Ryder. This was heard before the privy council 18th of March, 1730, when it was ruled that Lucretia took an estate tail. The Chief Justices Raymond and Eyre assisted at the decision. Richard Morris, Appellant, *v.* J. Ward and Others, Respondents, from Barbadoes.—Judgment affirmed.

[The above note was read by Lord Kenyon in giving judgment in Alpass *v.* Watkins, 8 T. R. 516., where the question turned upon the effect of words of limitation in fee simple engrafted upon a limitation to heirs of the body in a *deed*. J. W. being seised in fee of the lands in question, by lease and release, being a settlement previously to the marriage of his son J. W. the younger, with S. S., in consideration of the intended marriage, and of the lady's portion, and for a competent settlement and provision for her, *and for the settling, conveying, establishing, and assuring* of the lands *to the several uses, intents, and purposes thereinafter expressed*, conveyed the premises to the use of J. W. the younger for life, remainder to the use of S. S., the intended wife, for life, and from and after the several deceases of J. W. the younger and S. S., and the survivor of them, then, to the use of the *heirs of the body* of the said S. S. by the said J. W. the younger, *and of their heirs and assigns for ever*, and for default of such issue, to the use of the right heirs of J. W. the younger. J. W. the younger, and S. his wife, levied a fine, and declared the uses according to their joint appointment; and then contracted to sell. The purchaser having brought an action for his deposit, the question was whether J. W. the

younger, and S. his wife, could make a good title. It was contended, that though they could make a legal title, yet that equity would rectify the settlement, and that the purchaser taking with notice would be liable. But Lord Kenyon said that, sitting in a court of law, they could not take notice of an equitable title, (*a*) and it could not be doubted that the defendant could make a good legal title. And, after citing Morris *v.* Ward, he added, "though the above were only the reasons of the counsel in that case, they contain as much good sense, and sound law, as if they had the authority of all the judges of England. And that was a stronger case than the present; for there the question arose on a will; and, in order to effectuate the intention of a devisor, a greater latitude of construction is allowed by the courts than in the construction of deeds. But this is the case of a deed; a deed to uses, which must be construed like a common law conveyance. And there is no case, from Shelley's case down to the present time, in which it has been holden that words in a deed, similar to those in this deed, did not create an estate tail. If we were to determine otherwise, we should entrench on established rules of law, and we should *defeat the intention* of the parties in this and almost every other case. Cross remainders could not be raised. The consequences of a contrary decision were well explained by Lord Ch. J. Wilmot, in the case of Roe d. Dodson *v.* Grew." (*b*)

Notwithstanding that Lord Kenyon deemed the reasons of counsel in Morris *v.* Ward entitled to such grave consideration, it does appear to be little less than idle to refer the rule in Shelley's case to an anxiety on the part of the Courts to embrace the whole line of heirs; and to talk of consulting the *intention* by vesting the inherit-

(*a*) But see Maberly *v.* Robins, 5 Taunt. 625. This doctrine of Lord Kenyon is clearly not law.

(*b*) *Supra*, 314.

ance in the first taker. Mr. Preston expressly says that the rule is levelled against the intention; (a) but the above reasoning treats the rule as introduced in aid of the intention.

Mellish v. *Mellish.*

2 Barn. & Cres. 520.

[This and the two following cases have appeared in print too late for insertion in the body of the Work.]

Devise in these words, "Hamels [a messuage, &c. of which the testator was seised in fee] to go to my daughter C. M. as follows:—in case she marries, and has a *son*, to go to that son; in case she has more than one daughter at her husband's, or her death, and no son, to go to the eldest daughter, but in case she has but one daughter, or no child, at that time, I desire it may go to my brother W. M." Held that the word "son" was here used as a collective term, with a view to the whole class, and gave C. M. an estate in tail male.

[The counsel for the plaintiff stated it to be a general rule, that where a man devises to A. an estate for life, with remainder to his son or sons, then, in favour of the *intention* of the devisor, (unless it be clear from the language of the will that the son is to take *eo nomine* as purchaser,) the word *son* or *sons* will be construed collectively, and as descriptive of all the male descendants, as a class, and the devise will give to A. an estate of inheritance in tail male.

There is certainly a strong line of authority for construing "son" or "sons" as collective terms. There seems, however, to be no special virtue in these words; nor is it

(a) *Supra*, 280.

easy to reconcile the above position, (which seems to be a little too extensive) with those cases in which a similar latitude of construction has not been extended to the words "daughters," "children, &c." The Courts seem to have gone far enough as well in construing appropriated words of designation, (*viz.* sons, children, &c.) as words of limitation, (see 2 Bligh 87,) to effectuate a supposed general intent, collected frequently from the words themselves, but which intent the construction exposes to immediate destruction,) as in construing appropriated words of limitation, (*viz.* heirs of the body,) as words of particular designation. To depart from the proper meaning of words, without a plain intent or cogent necessity, tends to confound the use of all language."

The case of Wight *v.* Leigh, (*a*) was cited in support of the above position. But it does not appear from the report that the Court considered the words "first and other sons" in that case as words of limitation.]

Chorlton v. *Craven.*

Cited by Mr. Preston, arg. in Mellish *v.* Mellish, *supra*, from a MS. Note.

Devise to T. C. during his life, with remainder to his *first son* in tail male lawfully begotten, severally and successively, (not saying to the second, third, fourth, and other sons,) *and for want of such issue*, either of his son T. C., and his son J. C., then he devised the estate to his daughters and their children share and share alike, to be held to them and their heirs for ever, as tenants in common, and not as joint tenants. Held that T. C. was tenant in tail.

(*a*) *supra*, 333.

Murthwaite v. *Jenkinson.*

2 Barn. and Cres. 359.

Devise to trustees, and to the survivors and survivor of them, and the heirs of such survivor, of testator's freehold estate in trust to pay thereout annuities and legacies, and after bequeathing certain annuities and legacies, he devised the rents of the remainder of his estate to three nieces E. M., M. M., and C. M., share and share alike, for their respective *lives;* and from and after the decease of them, or either of them, the *lawful issue* of them, and each of them, should have his or her mother's share of such residue of such rents for *life* in like manner; and if either of his nieces should die in the lifetime of the others or other of them, without issue of her body lawfully begotten, the share of her dying without issue as aforesaid should go to, and be shared equally between, the survivors of his said nieces for their respective lives, and afterwards by the lawful issue of the survivors of his said nieces in like manner; and if all his nieces, and their issue, save one, should die without issue lawfully begotten, then such surviving niece should have the whole of the rents of such residue for her life, and after her decease the lawful issue of such surviving niece, (if more than one,) should have the whole of the rents of such residue, equally between them, share and share alike, to hold to them, and each of them, if more than one, their or his or her heirs and assigns, as tenants in common; and if but one, then to such only one, his or her heirs and assigns for ever; *and if all his nieces should die without issue,* then from and after the decease of the survivor of them, without issue as aforesaid, to testator's next heir-male of the name of M., to

hold to such heir male, and his heirs, in manner aforesaid. The Court of King's Bench, upon a case sent by the Lord Chancellor, certified that the three nieces took estates tail. The Court of Common Pleas had previously certified, *(supra*, 38. *n. f.* where for *Murthwhite* read *Murthwaite,)* that the nieces took estates for life, with remainder to their children in tail.

FINIS.

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